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No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1939

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES; CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES; L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES; ET AL., PETITIONERS

v.

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 593

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES; CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES; L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES; ET AL., PETITIONERS

v.

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The judgment of the District Court was entered without an opinion (R. 319–320). The opinions of the United States Court of Appeals for the District

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of Columbia (R. 388–410) is reported in 107 F. (2d) 627.

JURISDICTION

The decision of the Court of Appeals for the District of Columbia was announced on August 4, 1939 (R. 387–388), and its judgment was entered on October 3, 1939 (R. 410). The petition for a writ of certiorari was filed on December 16, 1939, and granted on February 5, 1940. The jurisdiction of this court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondents are steel manufacturers who, dissatisfied with the determination under the Public Contracts Act of minimum wages to be paid by Government steel contractors, brought suit to enjoin enforcement of the determination. The questions are—

1. Whether the respondents have standing to maintain this action.

2. Whether this suit is against the United States which has not consented to be sued.

3. Whether a wage determination by the Secretary of Labor under the Public Contracts Act is subject to judicial review.

4. Whether the complaint states a cause of action for an injunction.

5. Whether the wage determination is void because arbitrary, capricious, or erroneous in law.

6. Whether the complaint states a cause of action for a declaratory judgment.

STATUTE INVOLVED

The statute involved, known as the Public Contracts Act, approved June 30, 1936, c. 881, 49 Stat. 2036, is printed in Appendix A, *infra*, pp. 1–8. Certain other relevant statutes are also contained in that Appendix.

Section 1 of the Act provides that in any Government contract for the manufacture or furnishing of supplies in an amount exceeding $10,000 there shall be included a stipulation, among others, that all persons employed by the contractor in the performance of the contract will be paid not less than "the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; * * *." Section 4 directs the Secretary of Labor to administer the Act and gives the Secretary or his authorized representatives power to make investigations and findings, to prosecute any inquiry necessary to his functions, and to make regulations to carry out the provisions of the Act. Section 11 of the Act provides that the provisions requiring inclusion of representations with respect to minimum wages shall apply only to con-

tracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Other sections of the Act provide methods by which to determine if there has been, and penalties for, a breach of the stipulations (Secs. 1, 3, 5) and for exceptions, modifications, and tolerances with respect to the stipulations (Sec. 6). Sections 7, 8, 9 deal with definitions, previous acts unaffected by the Public Contracts Act, and types of purchases to which the Act is not applicable. Section 10 is the usual separability provision.

STATEMENT

The allegations of fact in the complaint as amended (R. 2–45, 313–318), and in the exhibits annexed to the complaint (R. 45–258), may be summarized as follows:

The respondents are seven corporations engaged in the manufacture and sale of products of the iron and steel industry (R. 3–9), and are classified in that industry "as either medium-sized or small companies" (R. 9). Five of these companies have their manufacturing plants in eastern and central Pennsylvania, one in Connecticut, and one in Maryland (R. 3–9). They pay a minimum hourly wage to common laborers of less than 62½ cents, and ranging from 52½ cents to 56½ cents (R. 3–9, 313). Six of the companies have in the past sold iron and steel products to various departments of the Government of the United States (R. 3–9),

and have generally realized profits from these sales (R. 313); it is alleged that all the respondents desire to bid on Government contracts (R. 4–9, 35).

On July 11, 1938, the Administrator of the Division of Public Contracts (created in the Department of Labor by order of the Secretary) notified manufacturers of iron and steel products, including the respondents, that hearings would be held before the Public Contracts Board created by the Secretary under the Act, to take testimony upon which recommendations would be made to assist the Secretary to determine the prevailing minimum wages (R. 15, 45–46). On July 25 and July 26, the Board held a hearing, at which the respondents were represented (R. 15–16), and on November 19, 1938, the respondents received copies of the findings of fact, conclusions, and recommendations of the Board dated October 27, 1938 (R. 17, 47–218). The majority of two members of the Board recommended (R. 18, 206–207) that the Secretary determine prevailing minimum wages of 45 cents an hour in twelve named southern states, and 62½ cents an hour in the remaining states. A minority of one member of the Board recommended the determination of prevailing minimum wages of 56½ cents in the region east of Altoona, Pa., 55 cents in certain midwest areas, and 60 cents in the far west, but agreed with the majority in other respects. (R. 19–20, 207–218.)

Respondents filed a petition to reopen the hearing before the Board (R. 20–21, 218–230) which

was denied by the Administrator of the Public Contracts Division (R. 21). Respondents then excepted to the recommendations made by the Board (R. 21–22, 231–239) and filed a brief in support thereof (R. 22). A hearing was held before the Acting Secretary of Labor, in which respondents participated (R. 22). The determination of the Acting Secretary, made on January 16, 1939, differed from the recommendations of the Board by determining the prevailing minimum wages for six localities to be 45, 58½, 60, and 62½ cents an hour (R. 24, 239–254).[1] All of the respondents are situ-

[1] "1. 45 cents per hour in the locality consisting of the states of Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia, Virginia, and West Virginia (except the counties of Hancock, Brooke, Ohio, Harrison, Monongalia, and Marshall);

"2. 60 cents per hour in the locality consisting of the states of Washington, Oregon, and California;

"3. 60 cents per hour in the locality consisting of the states of Montana, Idaho, Nevada, Wyoming, New Mexico, Utah, Colorado, and Arizona;

"4. 58½ cents per hour in the locality consisting of the states of North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri, and the area in and about East Saint Louis, Illinois;

"5. 62½ cents per hour in the locality consisting of the states of Wisconsin, Illinois (except the area in and about East Saint Louis, Illinois), Michigan, and Indiana.

"6. 62½ cents per hour in the locality consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, and that portion of the state of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison, and Monongalia, and the District of Columbia."

ated in the northeastern locality for which wages of 62½ cents were determined. The effective date of the determination was March 1, 1939 (R. 25, 254).

Respondents on February 25, 1939, filed a complaint (R. 2–45, amended R. 313–318), which prayed a temporary restraining order, a preliminary injunction, and a final injunction against promulgation of the determination by the Secretary of Labor, the Assistant Secretary of Labor, and the Administrator of the Division of Public Contracts, and against its enforcement by the other petitioners (R. 38–44). A declaratory judgment that the determination is invalid was also asked (R. 38, 44).

The petitioners are (a) the Secretary of Labor, the Assistant Secretary of Labor (who as Acting Secretary made the determination), and the Administrator of the Division of Public Contracts of the Department of Labor, charged with administration of the Act; and (b) the Secretary of the Treasury, the Director of the Procurement Division of the Treasury, and the Secretaries of War, the Navy, the Interior, and the Postmaster General, who are alleged to control the award of various Government contracts (R. 9–12).

The complaint alleges that the determination is invalid because (a) of its erroneous, arbitrary, and capricious construction of the word "locality" (R. 25–27; 313–315); (b) of its disregard of facts in the record of the hearings and the report of the Public Contracts Board showing the existence of well-defined and long-established wage differentials

among various districts in the locality in which respondents' plants were situated (R. 28–30, 315–316); (c) of the lack of evidence to support the determination that the area in which the respondents' plants were situated constituted a "locality in which materials * * * are to be manufactured or furnished" within the meaning of the Public Contracts Act (R. 30–31); and (d) of the failure to accord respondents a fair hearing, in that facts not contained in the record were considered, their request to reopen the hearings was denied, and the Acting Secretary was not impartial but was arbitrary and capricious (R. 31–32, 316).

The complaint alleges that invitations to bid on five contracts for the Navy Department, the bids pursuant to which were about to be opened, required a stipulation to pay the minimum ages fixed by the determination, and that some or all of the respondents desired to bid for these contracts if the determination did not become effective (R. 33–34, 316); that the petitioners intend to and unless enjoined will require the insertion of the stipulation in every iron and steel contract awarded after March 1, 1939 (R. 32, 34–35); and that numerous large contracts, upon which respondents desire to bid at prices which will enable them to make a profit, will be awarded in the immediate future (R. 35, 316–317).

The complaint further alleges that, unless injunctive relief is granted, the respondents will suffer immediate and irreparable injury in that (1) they

will be unlawfully deprived of the right to bid on Government contracts without the wage stipulation; (2) if they include the stipulations in their bids they might be estopped from claiming the invalidity of the determination or would, if unsuccessful in an attack upon its validity, be subject to harsh and excessive penalties under the Act; (3) to obtain Government contracts they will be required as a practical matter to raise wage levels even for non-Government business, and for laborers other than those receiving the minimum wage; (4) either by paying the minimum wages they will probably be unable to compete successfully with the larger companies already paying the minimum wages established by the determination, or by refusing they will lose a substantial source of revenue; and (5) there is no adequate remedy at law (R. 36–38).

On February 28, 1939, a limited restraining order against the Secretaries of Labor and the Navy was entered (R. 281–285). On March 6, 1939, the petitioners filed a motion to dismiss the complaint (R. 288–289) on the grounds that (a) the court lacked jurisdiction of the subject matter; (b) the complaint failed to state a claim upon which relief could be granted or a right entitling the action to be maintained; (c) no facts entitling the plaintiffs to equitable relief or to a declaratory judgment were stated; and (d) the facts alleged in the complaint showed that it was a suit against the United States. The temporary restraining order was dis-

solved, and the motion to dismiss was granted on March 14, 1939 (R. 319–320).

On March 17, 1939, the respondents filed, in the Court of Appeals, an original petition for an injunction pending final hearing and determination of the cause on appeal (R. 337–355). After argument before the entire bench on March 22, 1939, the Court of Appeals, on March 27, 1939, granted an injunction, pending further order of that court, which enjoined all of the petitioners from continuing to enforce the determination (R. 372). On March 29, 1939, the petitioners filed a motion for reargument on the petition for an injunction pending appeal or, in the alternative, for a clarification of the terms of the injunction and determination of the security (R. 373–380). The above motion and the appeal from the order of the District Court were argued in the Court of Appeals on April 4, 1939 (R. 385–386). On April 13, 1939, the petitioners filed a motion to dissolve the temporary injunction theretofore granted by the Court of Appeals (R. 386–387).

On August 4, 1939, in a *per curiam* opinion (Justice Edgerton dissenting) the Court of Appeals announced the reversal of the judgment of the District Court to be entered upon the opinions to be filed subsequently, and continued the temporary injunction in effect (R. 387–388). On October 3, 1939, the majority and minority opinions of the Court of Appeals were filed, the judgment was reversed, and the case was remanded with directions

to proceed in accordance with the opinion of the court (R. 388–410). The Court of Appeals has never acted upon petitioners' motion of March 29, 1939, for clarification of the injunction *pendente lite*, and for security.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

(1) In holding that the respondents have a legal right sufficient to maintain this action.

(2) In holding that the Acting Secretary of Labor's wage determination is subject to judicial review in this proceeding.

(3) In holding that this suit is not a suit against the United States.

(4) In holding that the complaint states a cause of action in equity for relief by injunction.

(5) In holding that the complaint states a cause of action for a declaratory judgment.

(6) In holding that the wage determination was not a valid exercise of discretion by the Secretary of Labor.

(7) In holding that the wage determination was arbitrary, capricious, and without warrant or authority of law.

SUMMARY OF ARGUMENT

I

The respondents have no standing to maintain this action, since they have no legal right which has been invaded. On settled principles, they can com-

plain of the asserted illegality of the Acting Secretary's determination, only if petitioners have committed acts which are tortious at common law or which violate a statutory privilege. Respondents urge that petitioners have tortiously interfered with a right to negotiate and bid for Government contracts, but it is clear that no common-law tort has been committed. Petitioners are not third-party intermeddlers, but are agents of the United States who, while they are alleged to have breached a duty owing to their principal, have violated no duty owing to the respondents. Furthermore, petitioners' acts are in no sense actionable or tortious at common law, and respondents have cited no case, authority or principle characterizing them as such.

No statutory privilege has been invaded. R. S. § 3709, requiring Government contracts to be let to the lowest responsible bidder, was enacted for the protection of the United States, not of the bidder, and has been uniformly interpreted not to confer any right even upon an unsuccessful lowest responsible bidder to set aside an award to another. The great majority of state decisions take the same view as to analogous state lowest bidder statutes. This accepted construction of R. S. § 3709 entirely destroys respondents' case. Respondents' attempt to distinguish a right to bid from the right to obtain an award must fail, since no one is obstructing respondents' right merely to bid. They must assert a right to have their bid not be rejected because

of the failure to include wage stipulations, and the decisions under R. S. § 3709 and similar statutes stand athwart their path. The Public Contracts Act, likewise, was adopted to benefit the public, not the respondents, and the latter can base no right upon it. The one case, *Harlan* v. *Employers' Ass'n of Maryland*, 162 Md. 124, 159 Atl. 267 (1932) which has passed upon this question has denied prospective bidders the right to sue.

The Public Contracts Act does not provide for judicial review of wage determination, a field in which Congress can constitutionally preclude judicial review. Section 5 of the Act, on which respondents have relied, relates only to quasi-judicial decisions on alleged violations of the terms of the Act by contractors, and not to quasi-legislative wage determinations. The genesis of the Act in the Davis-Bacon Act, and its legislative history, indicate that there was no Congressional intention to subject the Secretary's wage determinations to court scrutiny. Such review is inappropriate in a proceeding which is not part of a regulatory scheme.

Finally, the result of permitting respondents to maintain this action would be seriously obstructive to the contracting and purchasing activities of the Government, and would unnecessarily draw into the judicial sphere thousands of intricate questions of specifications, contract terms, etc. suitable only for administrative determination.

II

This suit is against the United States, which has not consented to be sued. The respondents have alleged that the petitioners, all of whom are officers of the United States, are acting outside of their statutory authority, but such an allegation alone does not establish that this suit is not against the United States. The relief sought here will control the terms of contracts which the Government enters into. The case is therefore squarely in line with previous decisions which have held that suits which seek to compel the performance of Government contracts, or which strip the Government of title to or possession of property, are suits against the sovereign, regardless of the officer's lack of authority. The relief sought will seriously interfere with and obstruct the Government's contracting and purchasing activities, which are purely executive functions; it is settled that a suit entailing such results is against the sovereign. The cases upon which the respondents rely involved suits seeking to restrain official acts which were regulatory in nature; such suits have been held to lie since the officer can be treated as a private wrongdoer, but are wholly irrelevant in the present case. No theory which is consonant with the decisions upholds the plaintiff's right to maintain this action.

III

Respondents have failed entirely to show the irreparable injury necessary to invoke equitable jurisdiction. The complaint alleges merely speculative damages. An injunction cannot be founded upon such a tissue of possibilities.

IV

The prevailing wage determination in question is a valid exercise of discretion conferred by the Public Contracts Act. The construction adopted in the Determination of the phrase "locality in which the materials * * * are to be manufactured" was entirely proper. Previous legislative, judicial, and administrative use of the term "locality," as well as its dictionary definitions, indicate that it has no such intrinsic meaning as to exclude the geographic units established in this case; on the contrary, the term has a flexible meaning depending upon the purpose for which and the context in which it is used. The aims and legislative history of the Public Contracts Act show that to restrict the term to a small geographic unit would contradict the intention of Congress, and defeat the Act's objectives. The purpose of the Act was to preserve advanced labor standards and to prevent encouragement by the Government of sweat shop conditions, and the migration of industries to low-wage areas. To attain these ends,

the original drafts of the Act allowed the Secretary to establish minimum wages, but, as finally adopted, the Act provided for determination, in advance of the bidding on contracts, of the minimum wages prevailing in the localities within which materials are to be manufactured. Although adopting the "prevailing" standard of the Davis-Bacon Act (providing for the payment on Government construction contracts of wages prevailing in the city or town in which the building was being erected), Congress was careful to choose different terms, authorizing the designation of large geographic units, in order to effectuate the purpose of the Public Contracts Act.

In the light of these purposes and this history, the phrase "locality in which the materials * * * are to be manufactured" must be sufficiently broad in meaning to cope with the evil of industrial migration to low wage areas and sweatshops. The actual facts of many industries clearly indicate this need. Administrative construction by the Secretary supports this interpretation. Likewise, support is gathered from the obvious administrative difficulties which would result from restricting the phrase to small geographic units.

The Court should not, on settled principles of review of administrative actions in injunction or mandamus proceedings, disregard the administrative construction of the statute unless it is palpably erroneous and arbitrary. This it certainly cannot be said to be.

The establishment of wage determinations is a legislative not a judicial function, and hearings are not required to be held. Accordingly, a wage determination need not be supported by the evidence adduced at a formal hearing, and there can be no judicial reexamination of the Acting Secretary's action, absent an averment of bad faith. However, the determination is fully supported by the evidence, and the painstaking care with which it was made demonstrates the lack of the elements of arbitrariness. The respondents were accorded an entirely fair hearing, whether one need have been held or not.

V

Nor does the complaint state a cause of action for declaratory relief. If injunctive relief is not granted, a declaratory judgment should not issue since it will be equivalent in every way, to an injunctive command against the Government officials who are the defendants. The Court should not issue a judgment which will seriously contravene the established policy of flexible and free functioning of the contracting and purchasing activities of the Government.

ARGUMENT

The respondents have heretofore laid the greatest emphasis upon and devoted the bulk of their argument to their contention that the wage determination is based upon an erroneous construction of the

Public Contracts Act, and is therefore invalid. We believe that contention to be entirely without foundation, and the final section of this brief presents a full argument on the question. However, we think that there is no occasion for this Court to consider or pass upon the validity of the determination in this case. First, because the respondents have entirely failed to show that they have any legal right or standing sufficient to enable them to attack the determination. Second, because the suit is brought against the United States without its consent.

I

THE RESPONDENTS HAVE NO STANDING TO MAINTAIN THIS ACTION, SINCE THEY HAVE NO LEGAL RIGHT WHICH IS DENIED OR INJURED BY THE ACTION OF WHICH THEY COMPLAIN

The respondents have instituted an entirely unprecedented type of action. The "rights" which they seek to assert have never been recognized by the courts. So far as we have been able to discover, a right in prospective bidders to challenge prevailing wage determinations for public contracts by public officers has been asserted in but one reported case, and in that case the existence of such a right was summarily denied. *Harlan* v. *Employers' Assn. of Md.*, 162 Md. 124, 159 Atl. 267 (1932). A similar result, we submit, is compelled here.

A. THE RESPONDENTS HAVE STANDING ONLY TO RESIST TORTIOUS ACTION BY THIRD PARTIES OR TO VINDICATE A STATUTORY PRIVILEGE

Settled principles and respondent's concessions reduce to a narrow compass the issues which determine respondent's standing to sue.

It should be made clear at the outset that neither the Secretary of Labor's prevailing wage determination, nor the subsequent inclusion in Government steel purchase contracts of a stipulation requiring payment of not less than the wages so determined, in any way interferes with the respondents' general right to conduct their iron and steel business. Obviously, such requirements relate only to the terms upon which the respondents may do business with a particular customer—the United States Government. Only if the respondents wish to enter into contracts with the United States will they be required to pay the wages called for by the determination, and they will be required to pay those wages only to such of their employees as are engaged in the manufacture of the materials used in the performance of the contract. Accordingly, if the respondents have any right which is to be protected in this case, it is not a right to do business generally, but simply a right to do business with the United States.

The issue is refined still further by application of the elementary proposition that no one can complain of the refusal of another to have dealings or

enter into contracts with him, no matter for what reason. *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565; *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46 (C. C. A. 2d); Cooley on Torts (1880), p. 278. Like any private individual, the Government has the privilege of deciding on what terms it will do business with others. This rule is no longer open to question. *Atkin* v. *Kansas*, 191 U. S. 207; *Ellis* v. *United States*, 206 U. S. 246; *Heim* v. *McCall*, 239 U. S. 175; *Campbell* v. *City of New York*, 244 N. Y. 317, 155 N. E. 628 (1927). Indeed, the respondents concede that they have no legal right to do business with the Government except upon such terms and conditions as the Government may prescribe (Br. in Opp. p. 37).

Respondents, consequently, define the right which they assert as the right "to bid and negotiate for Government contracts free of limitations or conditions other than those imposed or authorized by Congress" (Br. in Opp. p. 20). Thus, the controversy narrows itself to respondents' standing to enjoin action under a valid statute prescribing the conditions under which one may contract with the Government. Capacity to maintain the suit is said to exist because the action of the officials applying the statute is charged to be erroneous and illegal, and thus to leave them stripped of their governmental authority. The petitioners, therefore, are said to have the status of private intermeddlers and accordingly to be liable for their

interference with respondents' potential contracts with the Government (Br. in Opp., pp. 31–39).

Respondents, then, pitch their case upon the proposition that petitioners, wanting statutory authority, act as private persons and are subject to accepted restraints against unlawful interference with contract relations by third parties. See *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510. But, even if it be assumed that petitioners have the status of individuals and of third parties, respondents must face other insuperable obstacles to maintenance of this suit. Respondents must, in addition, show that the actions of the petitioners, regardless of the "legality" of those actions, invade some protected legal rights of the respondents. The right must be "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege" or else the respondents have no standing to attack the wage determination. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118, 137–8. See also *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Louisiana* v. *McAdoo*, 234 U. S. 627, 631; *Massachusetts* v. *Mellon*, 262 U. S. 447.

Respondents do not dispute the accuracy or the applicability of this rule, nor do they urge that they assert rights based upon property or upon contract. The issue, therefore, is narrowed to respondents' alternative contentions, that petitioners threaten an unlawful or tortious interference with respond-

ents' right to bid on government contracts (Br. in Opp., pp. 31–33), or that respondents have a statutory privilege to enjoin illegal action by petitioners (Br. in Opp., pp. 33–37). The succeeding sections of this point show that neither proposition is tenable.

B. PETITIONERS HAVE NOT COMMITTED OR THREATENED TO COMMIT ANY TORTIOUS ACTS

We think it evident that the petitioners have committed no act which violates the respondents' common-law rights and thereby constitutes a tort. The respondents allege that they desire to bid and negotiate for and enter into contracts with the United States. In carrying on such business they are, no doubt, entitled to legal protection against certain types of interference. One may suppose that if a competitor of the respondents by force or deceit prevented them from delivering bids to Government contracting officers, the competitor could be held liable for or enjoined from interfering with the respondents' business transactions. But their right to do business with the Government is not interfered with in such a way as to constitute a tort unless at least two factors are present. First, the interference must be by a third party, not by the Government itself. For, like any private person, the United States may refuse to enter into contracts with the respondents for any reason or no reason. Consequently, the respondents must show that the petitioners, all of whom are Federal officers, are "third parties" with respect to transactions be-

tween the respondents and the United States. Second, the interference must be of an unlawful type. But third parties do not commit torts *merely* by preventing or obstructing business between others. The obstructive acts of third parties must be wrongful—coercive, fraudulent, dishonest, malicious, or otherwise unjustifiable—or they will not be considered torts.

1. Petitioners are not third parties as between respondents and the United States

In the field of public contracts, it would seem sufficiently obvious that petitioners are not third parties between respondents and the Government. But the respondents earnestly claim that the petitioners "were acting as individuals, and therefore, as third parties *vis-à-vis* respondents and the Government" (Br. in Opp. p. 32).

Obviously, the petitioners are no mere strangers to negotiations between the respondents and the United States for Government contracts. As regards petitioner Perkins (and her subordinates, petitioners McLaughlin and Walling), the Public Contract Act imposes upon her the duty of making prevailing wage determinations, and requires public contracts to contain stipulations embodying the wages so determined. Petitioners Morgenthau, Peoples,[2] Edison, Woodring, Ickes, and Farley are

[2] With respect to petitioner Peoples, respondents allege that he issues rules and regulations requiring the inclusion of specified provisions and stipulations in Government contracts (R. 10).

alleged by the respondents to control the award of Government contracts (R. 9–12).

It requires no demonstration that the United States Government is like a private corporation in that it can only negotiate for or enter into contracts through and by means of officers and agents. The respondents have suggested that petitioners are not "the Government" (Br. in Opp., p. 37), but it is quite clear that the respondents would have little success in negotiating or contracting with a corporate but incorporeal abstraction; they can only do business with officers and agents of the Government. And it is as officers and agents of the prospective purchaser that the petitioners must necessarily be regarded in determining whether their acts are tortious.

In ascertaining whether any common-law right of the respondents has been tortiously disregarded, therefore, the situation is identical with that which would be presented if the Government were a private individual or corporation, and the petitioners its agents. *Dibble* v. *New Haven*, 56 Conn. 199, 14 Atl. 210 (1888). The respondents cannot contest this analysis, since they concede that the Government, like any private person, can accept or decline to do business as it desires (Br. in Opp., p. 37), and since they insist that the petitioners—as officials acting outside their authority—be treated solely as individuals (Br. in Opp., pp. 32, 37, 40–41).

By hypothesis, accordingly, the problem is the same as though we assume that a private individual or corporation, desirous of purchasing products of the type sold by the plaintiffs, determines not to deal with any sellers paying substandard wages and directs its agent or officer to determine the prevailing minimum wage in the plaintiffs' locality. The agent or officer—not fraudulently, in bad faith, or with intent to injure the plaintiffs—incorrectly construes the term "locality" and therefore makes a determination contrary to the instructions of his principal. It is unthinkable that the agent or officer would be liable, on any theory of the law of torts, to the prospective sellers who failed to secure contracts because of the principal's refusal to deal with vendors paying less than the minimum wage as so determined. Nor could the plaintiffs enjoin the agent or officer from communicating his determination to his principal, nor enjoin purchasing agents or officers of the principal from giving effect to the determination.

We have been unable to discover any case holding or suggesting, or any writer who believes, that preventing the formation of a contract under the circumstances described would constitute a tort. Nor have the respondents cited any such authorities.

Indeed, the above circumstances might be radically aggravated without alteration of the result. The principal might have no interest in the matter of prevailing wages, and the agent or officer might decline to enter into contracts in violation of his

principal's instructions. But such acts at most would render the agent or officer liable to his principal. The breach of duty owing to the principal would not in itself make the agent or officer's act tortious toward potential contractors. The agent or officer's liability to third parties would have to rest on independent grounds.[3]

Petitioners are, in truth, simply agents of the Government who are alleged erroneously to have applied the standards of the Public Contracts Act. Accepted principles, designed to ensure public responsibility, might serve to make their status that of individuals rather than Government officers. But no legal principle can be found which would subject the public officer to a far greater vulnerability to suit than that of a private individual, on the fallacious theory that the officer's status is that of a third party intermeddler in the transaction, when in fact the officer is acting purely as an agent.

2. The petitioners' acts are not of a wrongful character

But even if it were assumed that petitioners had the status of third parties, it is not enough that the respondents assert generally that the petitioners are guilty of "unjustifiable interference" with negotiations and dealings (Br. in Opp., p. 32),

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[3] Restatement of Agency, § 352, 357; *French* v. *Fuller*, 23 Pick. (Mass.) 108 (1839); *Coe v. Ware*, 271 Mass. 570, 573, 171 N. E. 732, 733 (1930); *Ross* v. *Wright*, 286 Mass. 269, 190 N. E. 514 (1934); *Ultramares* v. *Touche, Niven & Co.*, 255 N. Y. 170 (1931); *Dibble* v. *New Haven*, 56 Conn. 199, 14 Atl. 210 (1888).

and thereupon conclude that the petitioners' acts are tortious. In fact, none of the factors are present which the courts have always required as a basis for characterizing action as a tortious interference with actual or potential contract relations.

Obviously, the petitioners have not induced any breach of contract, since the respondents claim that they are being prevented from entering into contracts.[4] Nor have the petitioners disparaged the quality of respondents' goods,[5] nor do we understand that any claim of personal defamation is made or could be made.

Insofar as the petitioners may have prevented the formation of contracts, none of the elements of tortious conduct are present. In this field the broadest formulation of liability seems to be that stated in *Union Car Advertising Co. Inc.* v. *Collier*, 263 N. Y. 386, 401, 189 N. E. 403, 409 (1934):

> A cause of action has also been recognized where a party *would* have received a contract but for the malicious, fraudulent, and deceitful acts of a third party, such, for instance, as materially lying about him * * * [citing cases]. There must be some certainty that the plaintiff would have gotten

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[4] See Carpenter, *Interference with Contract Relations* (1928), 41 Harv. L. Rev. 728; Sayre, *Inducing Breach of Contract* (1923), 36 Harv. L. Rev. 663; Harper, *Treatise on the Law of Torts*, § 231–32; Comment (1938), 37 Mich. L. Rev. 115.

[5] Restatement of Torts, § 627, § 650; Harper, *op. cit. supra*, § 276.

the contract but for the fraud. This cannot be left to surmise or speculation.

See also *Goldman* v. *Harford Road Bldg. Assn.*, 150 Md. 677, 133 Atl. 843 (1926). As shown above, the petitioners are not "third parties," as is required by the rule so stated; they are agents and officers of the prospective buyer. Nor is there any allegation that the petitioners' acts were malicious, fraudulent, or deceitful, or that the petitioners were guilty of any material untruths. Nor is there any certainty whatsoever that the respondents would have received any contracts but for the petitioners' acts. They are merely prospective bidders. See *Matter of Martin Rooney*, 26 Misc. 73, 74, 56 N. Y. Supp. 483 (1899).

Needless to say, the mere fact that the petitioners are Government officers does not affect the results clearly dictated by the foregoing principles. Assuming that they misconstrued a statute, even violently, such a mistake is uniformly held not to constitute a tort in and of itself. Even if the erroneous construction was "arbitrary, capricious, and malicious," no tortious liability is thereby created at common law.[6] Furthermore, while there is no claim of defamation, it has been uniformly held that Cabinet Officers are absolutely privileged to

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[6] *Standard Nut Margarine Co.* v. *Mellon*, 72 F. (2d) 557, 559 (App. D. C.), certiorari denied, 293 U. S. 605; *Cooper* v. *O'Connor*, 105 F. (2d) 761 (App. D. C.); *Fletcher* v. *Wheat*, 100 F. (2d) 432 (App. D. C.), certiorari denied, 307 U. S. 621; *Lang* v. *Wood*, 92 F. (2d) 211 (App. D. C.).

defame private persons or disparage the quality of their property if such action is taken in the course of the "exercise of an Executive function, if the matter has some relation to the Executive proceeding in which the officer is acting."[7]

The respondents lay great stress upon the fact that they will be injured in their competitive relations with other iron and steel manufacturers. They claim to be less able than their competitors to pay the prevailing minimum wage (62½¢ per hour) established by the Secretary of Labor's determination. But it is now conclusively determined that the mere fact that the respondents may suffer in competition with their competitors affords them no ground for complaint. The competition from which they will suffer is entirely lawful. In a succession of cases, this Court has held that one cannot complain of injury to one's business arising out of competition, even though this competition may be fostered, aided, or made effective by Governmental action which is without either constitutional or statutory warrant. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Edward Hines Trustees* v. *United States*, 263 U. S. 143; *Sprunt & Son* v. *United States*, 281 U. S. 249.

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[7] Restatement of Torts, § 591, § 641; *Spalding* v. *Vilas*, 161 U. S. 483, 498; *Mellon* v. *Brewer*, 18 F. (2d) 168 (App. D. C.); *De Arnaud* v. *Ainsworth*, 24 App. D. C. 167.

No other recognized version of the *prima facie* theory of tort—that one is liable for any intentional injury to another unless justified (see *Aikens* v. *Wisconsin*, 195 U. S. 194, 204)—can be invoked to brand the petitioners as tort-feasors. Unless the Court is to develop new common-law torts for purposes of this case, it must deny the respondents' standing to sue.

The cases relied on by the respondents do not support their contentions. All of them involve the elements of coercion, fraud, bad faith, malice, conspiracy, or intimidation, which the courts, as in the *Alabama Power* and *Tennessee Valley Authority* cases, *supra*, have regarded as essential if a tort is to be spelled out of interference with business dealings.

The present case involves no physical intimidation of possible customers.[8] Other cases cited by the respondents involved threats of prosecution or litigation made by individuals in bad faith, with the purpose of intimidating the plaintiff's customers.[9] But the respondents concede that such

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[8] *Tarleton* v. *McGawley*, 170 Eng. Rep. 153 (K. B. 1793); *Graham* v. *Street Railroad Company*, 47 La. Ann. 1656, 18 So. 707 (1895); *Roe* v. *Lundstrom*, 89 Utah 520, 57 P. (2d) 1128 (1936). Cf. *Deon* v. *Kirby Lumber Co.*, 162 La. 671, 111 So. 55 (1926).

[9] *Sparks* v. *McCreary*, 156 Ala. 382, 47 So. 332 (1908); *Emack* v. *Kane*, 34 Fed. 46 (C. C. N. D. Ill.); *Price-Hollister Co.* v. *Warford Corp.*, 18 F. (2d) 129 (S. D. N. Y.); *Dehydro, Inc.* v. *Tretolite Co.*, 53 F. (2d) 273 (N. D. Okla.).

acts are not tortious if done in good faith.[10] In one case it seems to have been held that noncompetitors may be enjoined from threatening customers with prosecution, even if the threats are made in good faith. *American Mercury Co., Inc.* v. *Chase,* 13 F. (2d) 224 (D. Mass.): But whether or not that decision be correct is of no importance here, since there is no allegation that the petitioners are threatening to prosecute the respondents or their customers.

Most of the cases cited by the respondents concern coercion by means of threats by public officers to institute criminal prosecutions under unconstitutional statutes, or prosecutions for which the statutes provided no basis. *Truax* v. *Raich,* 239 U. S. 33; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Terrace* v. *Thompson,* 263 U. S. 197; *Scully* v. *Bird,* 209 U. S. 481; *Crescent Mfg. Co.* v. *Mickle,* 216 Fed. 246 (D. Oreg.); *Pratt Food Co.* v. *Bird,* 148 Mich. 631, 112 N. W. 701 (1907); *State* v. *Cass County,* 17 N. D. 285, 115 N. W. 675 (1908). In still other cases outright trespasses were committed either by invasion of plaintiff's premises and the physical prevention of customers from entering, or by the seizure of goods.[11]

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[10] Brief in Court of Appeals, p. 118. See *Everybody's Tool & Die Wks., Inc.* v. *Costa,* 9 F. Supp. 440 (E. D. N. Y.).

[11] *Scully* v. *Bird, supra; American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 110; *Waite* v. *Macy,* 246 U. S. 606; *Roe* v. *Lundstrom, supra,* note 8.

It therefore appears conclusively that the petitioners' acts which are sought to be enjoined violate no common-law rights of the respondents. Those acts are not intrinsically wrongful, and the petitioners' duty to construe the Public Contracts Act correctly is, so far as the common-law rights of the respondents are concerned, a duty owing solely to the Government, and not to the respondents. The fact that the wage determination, even if based upon a mistake of law, may unfavorably affect the respondents' competitive status constitutes no legal injury. Accordingly, unless the respondents can show that some *statutory* right or privilege has been denied or injured by the wage determination, they have no standing to maintain this action.

C. THE RESPONDENTS HAVE NO STATUTORY RIGHT OR PRIVILEGE WHICH HAS BEEN INVADED

The respondents have invoked two federal statutes which, they claim, confer upon them the right or privilege to bid and negotiate for Government contracts (Br. in Opp. pp. 33–37). One is Section 3709 of the Revised Statutes, requiring public advertising for proposals for Government contracts—the so-called low-bidder act.[12] The other

[12] R. S. § 3709 (41 U. S. C. § 5) provides:

Except as otherwise provided by law all purchases and contracts for supplies or services, in any of the departments of the Government, and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate

is the Public Contracts Act itself. In order to support their right to maintain this action, the respondents must show that these statutes (or one of them) confer upon mere prospective bidders for Government contracts the right to insist in the courts that Government officers comply with the provisions of these acts. Furthermore, since it is not alleged that the petitioners have been guilty of any malice or bad faith, the respondents must establish a statutory privilege which enables them to attack, in the courts, the validity of official action taken in complete good faith under the statutes.

Before examining the two statutes in detail, it should be noted that the privilege which the respondents assert is misleadingly stated. They assert a right "to bid and negotiate for Government contracts free of limitations or conditions other than those imposed or authorized by Congress," and charge an invasion of that right by the petitioners as a result of the determination. In fact, except in certain limited situations which are not here involved, there is no "negotiation" for Government contracts other than bidding, for R. S. § 3709 requires that Government contracts be effected by inviting bids, and it has been construed to require

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delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

acceptance of the lowest bid from a responsible bidder.[13] But actually the determination in no manner prevents the respondents from bidding. Their real complaint is that bids will not be considered, and contracts will not be awarded, unless the prevailing minimum wages specified in the determination are to be embodied in the contract stipulations. The respondents have not purported to claim any privilege with respect to the *awarding* of contracts, but in fact they must. They are not merely asserting a right to bid, because (a) they are not being prevented from bidding, and (b) their right to bid is empty and protection of it futile unless they are protected with respect to the awards. Accurately stated, the privilege which the respondents assert is a privilege to have their bids not be rejected solely because of their failure to agree to comply with the prevailing wage determination.

1. R. S., Section 3709, confers no right upon the respondents which has been invaded

In considering the bearing of R. S. § 3709 upon the present case, it should be borne in mind that the statute does not *expressly* impose any limitations or requirements upon the *award* of Government contracts. In terms, it requires merely that contracts for supplies and services shall (except in emergencies) "be made by advertising a sufficient time previously for proposals respecting the

[13] *Infra*, pp. 34, 65.

same". The statute has, however, been uniformly construed to require the award of Government contracts to the lowest responsible bidder. *Scott* v. *United States*, 44 C. Cls. 524; *Schneider* v. *United States*, 19 C. Cls. 547; 22 Op. A. G. 1.

But the respondents have been unable to cite authority for the proposition that this statute confers any rights or privileges upon mere bidders, much less prospective bidders.[14] Their inability is

[14] The respondents have cited (Br. in Opp., pp. 35, 37) only a dictum in *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318. In that case the plaintiff's bid (to supply the Post Office Department with envelopes) had been accepted, and the contract awarded. Before the contract was formally approved and signed, a new Postmaster General cancelled the contract, and made a different contract for the same supplies with other contractors. The plaintiff sued the United States for damages in the Court of Claims. On appeal to this Court, the only questions presented were, as stated by the Court (249 U. S. at 317), whether there was a completed contract and the measure of damages. This Court held that a valid contract had come into existence, and affirmed the judgment for the plaintiff. It will be seen that the *Purcell* case has nothing to do with the present case. It concerns the rights of *contractors* not bidders. But the respondents rely upon the statement in the opinion (249 U. S. 313, 318):

"There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies or services to the Government would else be a mockery—a procedure, we may say, that is not permissive but required (§ 3709, Rev. Stats.). By it the Government is given the benefit of the competition of the market and each bidder is given a chance for a bargain. It is a provision, therefore, in the interest of both Government and bidder, necessarily giving rights to both and placing obligations on both. And it is not out of place to say that the Government

not surprising, since it is entirely clear that R. S. § 3709 was enacted for the protection of the Government, and to guide its internal workings; it embodies no purpose to benefit or confer rights on mere bidders.[15] This Court (per Holmes, J.) stated that its requirements are "for the protection of the United States, not of the seller." *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78; *cf. United States* v. *N. Y. & Porto Rico S. S. Co.*, 239 U. S. 88; *McGowan* v. *Parish*, 237 U. S. 285, 294. It is significant that the Act has very rarely been before the courts. Upon the few occa-

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should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own."

But only by tearing these remarks out of their context do the respondents find support in them. To be sure, a bidder acquires rights when his bid is accepted and ripens into a contract. But it is perfectly clear that no question of the rights of *mere* bidders, much less of *prospective* bidders was before the Court, and that the language quoted above means merely that, under R. S. 3709, after a bid has been accepted and a contract awarded, the bidder has become a contractor and can enforce his contractual rights.

[15] R. S. § 3709 and similar federal statutes have evidently been enacted in order to protect the Government against having to pay excessive prices for its supplies, and against possible fraud or disloyalty of its officers and agents. One of the earliest federal "low-bidder acts" (Act of March 3, 1843, c. 83, 5 Stat. 615, 617, relating to naval provisions and supplies; *cf.* R. S. § 3718) was introduced as an amendment to the Naval Appropriation Act for 1843 immediately after a general discussion in the House of Representatives about mismanagement, or worse, on the part of the then head of the Bureau of Provisions and Clothing of the Navy, and the extravagant prices he paid for supplies. 12 Cong. Globe 374, 376.

sions when R. S. § 3709 (or any similar federal statute) has been before the courts, it has been uniformly held or stated that it gives no standing to bidders to attack the award of contracts.[16] Had it ever been thought that Congress intended that R. S. § 3709 should confer privileges upon mere bidders or prospective bidders to obtain judicial enforcement of its provisions, there would unquestionably have been many instances of recourse to the courts.[17]

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[16] *O'Brien* v. *Carney*, 6 F. Supp. 761 (D. Mass.); *B. F. Cummins Co.* v. *Burleson*, 40 App. D. C. 500; *Champion C. P. Co.* v. *Joint Comm. on Printing*, 47 App. D. C. 141; *cf. Strong* v. *United States*, 6 C. Cls. 135.

[17] In a letter of January 21, 1930, to the chairman of the Subcommittee of the Committee on the Judiciary of the House of Representatives considering one draft of the proposal to establish uniform requirements for Government contracts (H. R. 5568, 71st Cong., 2d Sess.), the Comptroller General recognized that the unsuccessful bidder had no standing to sue in the courts. See Hearings before the Committee on the Judiciary, House of Representatives, 71st Cong., 2d Sess., on H. R. 5568 (Serial 4, Pt. 1), p. 26–27. The interdepartmental board on contracts of the Bureau of the Budget (composed of representatives of the executive departments which purchase and contract) which drew up the various drafts introduced in the 70th and 71st Congresses took the same view. See Hearings, *supra*, at p. 15–22. On the reintroduction of a draft in the 74th Congress, 1st Session (S. 215), the Senate Committee on the Judiciary, in its report (S. Rep. No. 433) indicated its view that there was no judicial review (p. 5–6), although it agreed with the Comptroller General that his office should review the award of contracts.

For the history of this proposal (which has never been carried into effect), see H. Rep. 2863, 71st Cong., 3d Sess.;

The federal "low-bidder act" is paralleled by similar enactments in most of the States, and similar provisions in municipal ordinances and charters. The respondents protest (Br. in Opp., p. 36, n. 14) that these State and municipal enactments differ from R. S. § 3709. This is true, but they differ chiefly in that they customarily provide expressly that public contracts shall be awarded to the "lowest bidder," the "lowest responsible bidder," or the "lowest and best bidder."[18] As has been seen, the federal statute contains no such *express* requirement. Consequently, the State and municipal laws might much more easily be construed to confer rights on bidders than can the federal act, since, unlike the federal act, they contain express directions with respect to the awarding of contracts.

However, the great majority of the decisions under these State and municipal laws are to the effect that unsuccessful bidders have no standing whatever to attack the award of contracts to others, or to compel awards to themselves. Such are the decisions even where it is clearly established that the plaintiff is the lowest bidder, is responsible, and

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S. Rep. 433, 74th Cong., 1st Sess.; Hearings before the Committee on the Judiciary, House of Representatives, 70th Cong., 1st Sess., on H. R. 5767 (Serial 16, Pts. 1 and 2) and on H. R. 15713 (Serial 16, Pt. 3); Hearing before the Committee on the Judiciary, House of Reps., 71st Cong., 2d Sess., on H. R. 5568 (Serial 4, Pts. 1 and 2).

[18] *Infra*, Appendix B, pp. 11–19.

that his bid complies with all the requirements of the statute. Some cases, to be sure, turn on the fact that the award called for the exercise of discretion and judgment by public officers, with which the courts would not interfere.[19] But, even when it is shown that there is no reasonable basis for an officer's failure to award the contract to the plaintiff, or for his awarding it to another, the great weight of authority is that the bidder has no right which has been denied or which provides a standing to seek legal or equitable redress. The statutes are held to be enacted for the benefit of the Government and the public,[20] not for the benefit of bidders, and to confer no rights upon the bidders.[21]

The cases with respect to this proposition are numerous. We have collected and classified them

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[19] Needless to say, such exercise of discretion is called for in the present case. *Infra*, pp. 90–153.

[20] It is, accordingly, generally held that State or municipal taxpayers can compel public officers to comply with these acts, under the principle of *Crampton* v. *Zabriskie*, 101 U. S. 601. But no such action could be maintained against federal officers. *Massachusetts* v. *Mellon*, 262 U. S. 447.

[21] There seems to be no "low-bidder act" tradition in England comparable to that in the United States. The Public Health Act of 1875 requires certain contracts of urban authorities to be let by advertising for tenders. St. 38 & 39 Vict., ch. 55, sec. 174 (4). The Local Government Act of 1933 (St. 23 & 24 Geo. V, ch. 51, sec. 266) makes this requirement of general application. But these provisions have been stated to be directory, not mandatory. *Young & Co.* v. *Mayor & Corp. of Royal Leamington Spa*, L. R. 8 App. Cas. 517 (1883).

in an appendix to this brief.[22] In 12 States—Arkansas, Delaware, Georgia, Iowa, Kentucky, Maryland, Missouri, Montana, North Dakota, Pennsylvania, West Virginia, and Wisconsin—it is definitely established that the State and municipal low-bidder acts, like the federal act, give bidders no standing to attack the award of public contracts. Although not so clearly established, such is probably the rule in 7 additional States—Connecticut, Indiana, Michigan, Minnesota, Mississippi, New York, and Vermont. The contrary rule prevails only in 5 jurisdictions—Hawaii, Louisiana, Nebraska, New Jersey, and Ohio—and perhaps also in Colorado, Illinois, and Washington.

The principle for which we contend is not only established by the great weight of case authority but is also stated to be the proper rule by the commentators.[23]

A leading federal case on this point is *Colorado Paving Co.* v. *Murphy*, 78 Fed. 28 (C. C. A. 8th), the facts of which are strikingly similar to the allegations in the present case. The board of public works of Denver adopted specifications which excluded a certain type of asphalt called "Alcatraz asphalt." The plaintiff, alleging that he was the

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[22] *Infra*, *Appendix B*, pp. 11–19.

[23] High, *Extraordinary Remedies* (3d ed., 1896), § 92; 2 Spelling, *Injunctions and Other Extraordinary Remedies* (2d ed., 1901), § 1553; 2 Dillon, *Municipal Corporations* (5th ed., 1911), § 811, p. 1224; Note (1934), 44 Yale L. J. 149, 152.

lowest reliable and responsible bidder, but that his bid was for Alcatraz asphalt, prayed for an injunction restraining the board from contracting with others, and directing an award to himself. The court found that the "overwhelming weight of the testimony was * * * that Alcatraz asphalt was equal in standard and quality to the accepted asphalts for paving purposes" and the evidence tended strongly to show an agreement between the other bidders which stifled competition.

The Circuit Court of Appeals held that the plaintiff had no right which enabled him to maintain his action, saying (Sanborn, C. J., p. 31–32).

> He is a mere bidder for some of the public work of this city—a contractor, or one who desires to be a contractor. His interest and that of his class, * * * is to get the highest price for their work and materials. It is obvious that the statute was not enacted for their benefit * * *. How, then, can this bidder maintain a suit for their violation? He cannot * * * it is now settled by the great weight of authority that the lowest bidder cannot compel the issue of a writ of mandamus to force the officers of a municipality to enter into a contract with him * * *. This principle is as fatal to a suit in equity as to an action at law. It goes not to defeat any particular cause of action, but to defeat the right to any relief.[24]

[24] Accord: *U. S. Wood Preserving Co.* v. *Sundmaker*, 186 Fed. 678 (C. C. A. 6th); *cf. Noce* v. *Edmund E. Morgan Co., Inc.*, 106 F. (2d) 746, 750 (C. C. A. 8th).

The respondents' attempt to draw support for their suit from R. S. § 3709 leaves them hoist with their own petard, since the decisions under that act and comparable state acts demolish the right which they assert. Undoubtedly, therefore, as they have heretofore, the respondents will attempt to distinguish the cases under "low-bidder acts" from the present case, by attempting to differentiate between the right *to bid* and the right *to obtain an award*.[25] But, as already stated, the petitioners have not denied or obstructed the respondents' right to bid.[26] The respondents may bid, omitting any stipulation to pay the prevailing wages specified in the Secretary of Labor's determination; their bid would be opened, considered, and rejected because it did not contain the stipulation. It is the certainty of rejection of their bid of which the respondents actually complain. But the respondents could not obtain judicial relief, even if the award were illegally rejected, because their legal rights would not have been invaded. No more can they complain because their bids will be rejected if they fail to stipulate to pay prevailing wages as determined by the Secretary of Labor.

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[25] *Cf.* Note (1940), 49 Yale L. J. 548, at pp. 554-56.

[26] There is no need to consider whether, had petitioners actually prevented the respondents from bidding, such action would have given a basis for equitable relief. It was so held under a state statute in *Matter of Weinstein Bldg. Corp.* v. *Scoville*, 141 Misc. 902, 254 N. Y. Supp. 384 (1931). But *cf. Matter of Martin Rooney*, 26 Misc. 73, 56 N. Y. Supp. 483 (1899).

The mere fact that the illegality lies in the determination which governs the award, rather than in the award itself, clearly adds nothing to the respondents' legal rights.

Indeed, respondents' status as mere prospective bidders robs them even of the support of the few decisions (*supra*, p. 39) under state statutes or municipal charters which have accorded actual bidders a right to enjoin unlawful awards to others. And it would seem a shocking conclusion if mere prospective bidders such as the respondents could obtain relief which, by the great weight of authority, unsuccessful bidders whose bids have been unlawfully rejected cannot have. Had the respondents actually submitted bids, and had their bids been the lowest, and sufficient in every respect except for the omission of the prevailing-wage stipulation, surely there would be much more reason for endowing them with a standing to sue than there is in the present case. In such circumstances, respondents would be able to show that they certainly would have received contracts but for the (assertedly) unlawful wage determination. Their damages could be computed. Yet, as we have seen, even in such circumstances, the courts recognize no right to relief. Situated as they in fact are, respondents' "damages" are entirely speculative.[27]

Respondents' effort to distinguish their actual status as *prospective* bidders from a status as

[27] *Matter of Martin Rooney*, 26 Misc. 73, 74; 56 N. Y. Supp. 483 (1899).

unsuccessful bidders leads to absurd results. They complain that they are being prevented from bidding, but that it is not so in fact; they attempt to distinguish cases denying relief to bidders where bids were unlawfully rejected, but, unless they reject the authority of those cases, the respondents are claiming an empty and futile right—to bid and have the bid rejected—which is not in fact being denied them.

2. The Public Contracts Act confers no right upon the respondents which has been invaded

The Public Contracts Act provides a method for determining the contents of one of the specifications to be inserted in invitations for bids to furnish the Government with supplies or services, and the contents of the corresponding stipulations to be inserted in Government contracts. Since, as we have seen, no common-law right of the respondents has been invaded, nor has any right or privilege under R. S. § 3709 been denied them, they cannot complain of the determination (even assuming it to have been illegal) unless the Public Contracts Act itself confers a right to attack the prevailing wage determination.[28]

Unless the Public Contracts Act is intended to benefit others (including the respondents) than the Government, the respondents can claim no right

[28] We show in the next succeeding subsection of our brief (*infra*, pp. 51–60) that the Public Contracts Act contains no *express* grant of a right to judicial review of prevailing wage determinations.

from the Act.[29] In *Di Caprio* v. *N. Y. C. R. R. Co.*, 231 N. Y. 94, 97, 131 N. E. 746, 747 (1921), Andrews, J., stated:

> Where a statutory duty is imposed upon one for the direct benefit or protection of another and the latter is damaged because this duty is not performed a cause of action arises in his favor based upon the statute * * *, but no one not included in the class so directly to be benefited may complain because the statute is not complied with. * * * The rule is not dissimilar to that applicable to provisions said to be unconstitutional.

In support of their asserted *statutory* rights to maintain their action, respondents have heretofore (Br. in Opp., p. 34) relied principally upon *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, *Waite* v. *Macy*, 246 U. S. 606, and *Gegiow* v. *Uhl*, 239 U. S. 3. But these cases establish only that *if* persons have property or statutory rights which are denied or invaded by unauthorized official action, they may under appropriate circum-

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[29] Thayer, *Public Wrong and Private Action* (1914) 27 Harv. L. Rev. 317; Lowndes, *Civil Liability Created by Criminal Legislation* (1932), 16 Minn. L. Rev. 361; Harper, *op. cit. supra*, § 78; Restatement of Torts, §§ 286, 288. See *Owen* v. *Westwood Lumber Co.*, 22 F. (2d) 992 (D. Oreg.) (competing merchant had no standing to sue company maintaining company store in violation of state statute); *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33; *Boronkay* v. *Robinson & Carpenter*, 247 N. Y. 365, 160 N. E. 400 (1928); *Exner* v. *Sherman Power Const. Co.*, 54 F. (2d) 510 (C. C. A. 2d); *cf. Morrison* v. *Work*, 266 U. S. 481, 488.

stances obtain judicial relief. Thus, in the *Magnetic Healing* case, *supra*, the court expressly found that the letters addressed to the plaintiffs (enclosing checks, drafts, money orders, and cash) were the property of the plaintiffs when deposited in the mail for transmission; unauthorized action by the postmaster in retaining and refusing to deliver such letters was held to violate the plaintiff's property rights (187 U. S. 94, at p. 110). Similarly, in *Waite* v. *Macy* and *Gegiow* v. *Uhl*, *supra*, the plaintiffs clearly had the right to import tea, and to remain in the United States, and the challenged official action was held to deny them such rights.[30] But these cases in no way bear on the problem of whether the Public Contracts Act (or any other Act) confers the rights which respondents assert in the present case.[31]

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[30] It is clear that in absence of prohibitory Congressional enactment, immigrants have the right to enter the country. *Cf. Chin Yow* v. *United States*, 208 U. S. 8, 12. Similarly, *Waite* v. *Macy*, *supra*, is distinguishable since in the absence of valid prohibitory legislation, there is a right to import which cannot be denied by customs officials. See *Buttfield* v. *Stranahan*, 192 U. S. 470, 497.

[31] Similarly, respondents' argument that the Public Contracts Act by imposing certain conditions on the "right" to negotiate contracts with Government, establishes a legal right to negotiate contracts if the conditions are complied with (Br. in Opp., pp. 33–34), in no way supports their contention. It is based largely on a statement in *Gegiow* v. *Uhl*, *supra* (Br. in Opp., p. 34 n. 9). Of course *if* there is a statutory right under certain conditions, other conditions cannot be imposed on the exercise of the right. But the mere fact that a statute authorizes official action under cer-

We find no sound, or even plausible, basis for the contention that the Public Contracts Act confers on the respondents any right upon which they may base an attack on the validity of the prevailing wage determination. The Act itself discloses no intention to confer such a right. Its chief purpose, as clearly disclosed in its background and legislative history, was to protect and benefit the public generally.[32] It was enacted shortly after the decision of this Court in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, which held Title I of the National Industrial Recovery Act unconstitutional. One of the principal purposes of that Act was to increase consumer purchasing power by maintaining wage levels, and thus to stimulate general business recovery. After the decision in the *Schecter* case, Congress felt that the Government should not even indirectly be a party to the anticipated wage cutting, and that the Government's influence as a consumer should be used to maintain wage levels, rather than to depress them. The prin-

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tain circumstances and not others establishes no private rights. Almost every statute for the guidance of official action, whether of a purely "intragovernmental" character or of a regulatory nature, imposes such conditions on officers. But private persons can compel official compliance with such conditions only if their rights are involved, and the conditions alone, obviously, do not grant legally enforceable rights. Statutory intent to protect or benefit the plaintiff must be shown.

[32] The purposes and legislative history of the Act are discussed and analyzed *in extenso*, *infra*, pp. 104–128, and pertinent extracts from the hearings and debates on the bill are set forth in Appendix C, *infra*, pp. 20–56.

cipal object of the Public Contracts Act was to accomplish exactly that result—a result sought in the interest of the purchasing power of wage earners, business recovery, and benefits to the nation as a whole and the public generally. Like R. S. § 3709, accordingly, the purpose is to benefit the general public and not to confer rights on bidders for Government contracts.

Such a policy, obviously, incidentally benefits certain private interests. It benefits manufacturers who maintain wage levels, since it takes away the advantages previously enjoyed by competitors who reduced their wage costs by paying less than prevailing wages.[33] But the respondents complain that the wages determined for their locality are *too high*, not that their competitors' wages have been determined too low. Incidental benefits are likewise extended to employees whose substandard wages are raised,[34] but the petitioners do not stand in their employees' shoes.

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[33] It is immaterial here whether such manufacturers could attack a determination. But, it may be observed, the benefits to them are incidental, and could furnish no basis for such an attack. Nor, under the doctrine of *Alabama Power Co.* v. *Ickes*, and *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, *supra*, would such a suit appear to lie.

[34] Nor need we discuss whether employees have a right under the Public Contracts Act to contest determinations. Here again, the benefits would seem to be incidental. But *cf. Denver Trades Council* v. *Vail*, 103 Col. 364; 86 P. (2d) 267 (1938). It would seem clear, however, that if respondents, whom the statute obviously was *not* intended to benefit, can attack a wage determination, employees also can.

The question of the right to maintain an action, under circumstances substantially identical with those in the present case, was before the Supreme Court of Maryland in *Harlan* v. *Employers' Ass'n of Maryland,* 162 Md. 124, 159 Atl. 267 (1932). That case arose under a Maryland statute (Act of 1910, Code of Public Local Laws, Art. 4, § 516) which provided, *inter alia,* "that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers * * * in any public work within the City of Baltimore." The act imposed penalties for violation of its provisions.[35] The suit was brought against officers of Baltimore by taxpayers, and by contractors who sued as prospective bidders. They alleged that the mayor had appointed a committee to advise him with respect to the "current rate" of wages, that the committee had reported, and that the building engineer of Baltimore had warned all contractors that they would have to comply with the schedule of wages recommended in the report on all public work. Reliance was placed upon a provision of the city charter similar to R. S. § 3709. The plaintiffs prayed that the defendant city officers be restrained from putting the schedule of

[35] The court had previously held the act constitutional, and that it could be enforced only by recourse to the criminal courts, not by injunction. *Ruark* v. *Engineers' Union,* 157 Md. 576, 146 Atl. 797 (1929). See also *Elkan* v. *State,* 122 Md. 642, 90 Atl. 183 (1914), aff'd 239 U. S. 634.

wages into effect, and from requiring contractors and subcontractors to meet the schedule.

The court, holding that the statute was purely penal and did not authorize the city to insert stipulations embodying the wage schedules in its contracts, ruled that such of the plaintiffs as were taxpayers were entitled to maintain the suit. But the court held otherwise as to the contractors and would-be bidders (162 Md., at 132):[36]

> Many contractors join in the bill on the ground that they might not be free to bid with the schedule of wages complained of in the specifications, as a condition precedent to their participating in public work in Baltimore. We do not understand that being engaged in the contracting business as such and that they may be prospective bidders for public contracts qualifies contractors to maintain a suit against the city. It is optional with them whether they bid at all * * * [citing *Campbell* v. *New York*, 244 N. Y. 317, 155 N. E. 628 (1927)], but it is not optional with the taxpayer whether he pays taxes.

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[36] It should be noted that the prospective bidders were in a far better position to complain than the respondents in the present case. The wage determination in the *Harlan* case was entirely without statutory warrant, for there was no statutory basis for *any* wage determination. In the present case, the wage determination was made in pursuance of a statutory mandate, and the respondents can complain only of an alleged misconstruction, admitted to be made in good faith.

The respondents attempt to spell out some sort of right to be free from the sharpened competition from their competitors, which the respondents fear will result if they have to pay the determined wages in order to bid. There can be no contention that there is a statutory basis for any such right, and we have shown that this is not a right recognized by the common law.[27]

The *Alabama Power Co.* case and the other cases in the same line of authority show that it is highly unlikely that Congress intended the Public Contracts Act to confer the right which the respondents assert. The wage determination does not prevent the respondents from bidding, and it does not prevent them from receiving contracts if they stipulate to pay the prevailing wages as determined. The only injury which respondents complain of if they do comply with the determination is the sharpened competition from competitors. This, as the cases show, has always been considered too slight to ground a cause of action. It is beyond all likelihood that Congress intended to create a new right of the sort the respondents claim under

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[27] *Supra*, p. 29. See *Alabama Power Co.* v. *Ickes*, *supra*; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, *supra*; *Louisiana* v. *McAdoo*, *supra*; *Edward Hines Trustees* v. *United States*, *supra*; *Sprunt & Son* v. *United States*, *supra*; see *United States ex rel. New York Warehousing Ass'n* v. *Dern*, 68 F. (2d) 773 (App. D. C.), certiorari denied, 292 U. S. 642; *Milwaukee Horse & Cow Comm. Co.* v. *Hill*, 207 Wis. 420, 241 N. W. 364 (1932); *cf. Railroad Co.* v. *Ellerman*, 105 U. S. 166; *Chicago Junction Case*, 264 U. S. 258.

the Public Contracts Act, the objectives of which were in the interest of the general public, and none of the incidental benefits of which extend to the respondents.

3. The Public Contracts Act does not provide for judicial review of wage determination

The respondents have suggested that Section 5 of the Public Contracts Act expressly contemplates judicial review of prevailing wage determinations (Br. in Opp. p. 39 n. 22). The suggestion is based on a wholly distorted analysis of Section 5 and its place in the scheme of the statute.[38]

Congress can, of course, constitutionally foreclose judicial review of administrative decisions on matters concerning contracts with the United States. *United States* v. *Babcock*, 250 U. S. 328; *Work* v. *Rives*, 267 U. S. 175; *Butte, Anaconda & Pac. Ry. Co.* v. *United States*, 290 U. S. 127; *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 182. Judicial review of the prevailing wage determinations would be highly inappropriate, and nothing in the Public Contracts Act or its history suggests that Congress intended the determination to be reviewable.

Section 5 of the Public Contracts Act, upon which the respondents rely, is set out in the

[38] Although elaborately briefed in the court below, neither the majority nor the minority opinion of the Court of Appeals commented on this argument.

margin.[39] It will be observed that one clause states that "findings of fact" if "supported by the preponderance of the evidence, shall be conclusive in any court of the United States." The section is very inartistically drawn; the clause in question is

[39] SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

so placed that it seems to confer powers upon the District Courts to make findings, but it is obvious that in fact the clause (together with the succeeding clauses) refers back to, and should have been added to, the first sentence of the section granting powers to the Secretary of Labor. So much is not disputed by the respondents, as they read the clause in question as applicable to the Secretary of Labor. However, the respondents contend that, by virtue of this clause the Secretary's wage *determinations* are reviewable, whereas in fact it is plain that only the Secretary's *decisions* with respect to breaches and violations of the stipulations required by Section 1 of the Act are reviewable.

Quite plainly, Section 5 is not designed to *confer* a right to review, but is directed simply to action of the Secretary which would affect contractual rights for which the Tucker Act provides an existing remedy. Textually, it offers no support for respondents' views. Reference is made in the final clause only to "decisions" which the Secretary is authorized to make to enforce the provisions of the Act, while the Act consistently refers to wage determinations as "determinations" (Sections 1, 11). "Decisions," "based upon findings of fact," which are "necessary to enforce the provisions of this Act" are adjudications that there have been violations of the stipulations imposed by Section 1. Such decisions are "quasi-judicial" in nature, since they impose directly upon the persons adjudged

guilty the liabilities for liquidated damages provided by Sections 2 and 3.

The first sentence of the section, to which the clause in question relates, is construed by the respondents as granting the Secretary power to hold hearings and make judicially reviewable findings (1) upon his own motion, or (2) on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of the Act, *or* (rather than the textual *and*) (3) on complaint of a breach or violation of any representation or stipulation. But it is plain that "and" was used advisedly, for the word was changed in Congress from "or" to "and."[40] Furthermore, it is apparent that (2) and (3) can have no application to wage-determination hearings. Accordingly, respondents must contend that while (2) and (3) refer only to the quasi-judicial functions of the Secretary, (1), which is linked in conjunction with them, refers both to his quasi-judicial and his quasi-legislative functions. No reason can be assigned for so scrambled an interpretation.

To read Section 5 to apply to wage determinations is to make the penultimate sentence of Section 4 surplusage. That sentence reads:

> The Secretary of Labor or his authorized representatives shall have power to make in-

[40] The word "or" appeared in Section 7 of H. R. 11554 (74th Cong., 2d Sess.), which was the progenitor of Section 5 of the Act.

> vestigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States.

If Section 5 is applicable also to the wage determinations under Section 4, this important portion of the preceding section is wholly without function. Doubly so, since Section 5 contains its own grant of corresponding power in similar terms.

Nor can it be said that the provisions of Section 4 empowering the Secretary to make findings and investigations "as herein provided" mean findings and investigations "as provided in Section 5." The reference is obviously to the investigation and findings necessary to *administer*, the provisions of Sections 1 and 6. The last portion of Section 5 grants authority, "as herein provided," to make investigations, findings, and decisions to *enforce* Sections 2 and 3. The Act thus preserves the dichotomy between the provisions granting quasi-legislative and those granting quasi-judicial powers to the Secretary. The former he is authorized to "administer," the latter to "enforce."[41]

The first attempt by Congress to regulate the wages paid to employees of public contractors was the Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494 (the first Davis-Bacon Act) relating to wages paid

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[41] Section 5 can certainly not be read to cover the applications for exceptions, modifications, and tolerances provided in Section 6. But if the provisions of Section 5 relates to wage determinations, there is no reason for different treatment of the findings and determinations called for under Section 6.

in the construction of public buildings. It provided that the prevailing rate of wages was to be determined by agreement between the contracting officer and the contractor after the contract had been made. In case of dispute, the Secretary of Labor was to make the determination which was to be final and conclusive upon all the parties. The recent case of *Gillioz* v. *Webb,* 99 F. (2d) 585 (C. C. A. 5th), has held the Secretary's determination similar to that of an appraiser or valuer, "a part of the process fixed by the contract for determining a price, or an amount to be paid," and subject to impeachment only for "fraud, dishonesty, or bad faith." See also *United States for the use of Boucher* v. *Murphy,* 11 F. Supp. 572 (W. D. Mich.).

Constant complaints that the determination of the wages during the course of the performance of the contract led to injustices and perhaps to collusion between contracting officers and the contractors [42] led Congress to amend the Act in 1935 to provide for predetermination of the wage rates prior to the issuing of invitations to bid. Act of Aug. 30, 1935, c. 825, § 1, 49 Stat. 1011, 40 U. S. C. §§ 276a *et seq.*[43] There is nothing whatever in the

[42] See S. Rept. 332, 74th Cong., 1st Sess., the report of the Subcommittee of the Senate Committee on Education and Labor appointed to investigate into relationships between employees and contractors in public works.

[43] A similar bill providing for predetermination (S. 3847, 72d Cong., 1st Sess.) was vetoed by President Hoover on June 30, 1932.

legislative history of the amendment to indicate that the Congress intended to lessen in any way the binding character of the Secretary's decisions." The Act itself contains no provision for any judicial review.

The Public Contracts Act was considered by Congress to be an extension of the theory of the Davis-Bacon Act (as amended) into new fields, with certain very important changes.[45] The later Act is modeled closely after the earlier one, with respect to the adoption of predetermination of wages, and the absence of any provisions for judicial review of the determinations. It is proper to assume that Congress carried over into the new statute its desire that the determination of prevailing wages be entirely free from review. This is borne out by the legislative history of the Public Contracts Act itself. There is hardly a suggestion in any of the three sets of hearings held by Senate and House

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[44] In the discussion in the House on S. 3847 (72d Cong., 1st Sess.) (vetoed by the President), Representative Connery, chairman of the sponsoring committee, stated that "The Secretary of Labor is the final arbiter." 75 Cong. Rec. 12377. Opponents of the measure complained that the determination rested entirely with the Secretary. 75 Cong. Rec. 12365, 12375. The veto did not go on this ground. 75 Cong. Rec. 14589, S. Doc. 134 (72d Cong., 1st Sess.). S. Rept. No. 332 (74th Cong., 1st Sess.), *supra*, note 42, which was a prime factor in inducing the 1935 Act, discusses elaborately the defects in the 1931 Act and proposals for amendment (which were later adopted), but does not even cast doubt on the conclusiveness of the determination.

[45] *Infra*, pp. 112–115.

committees [46] that judicial review of the wage determinations was implied in the bills being considered. On the other hand, just as in the case of the Davis-Bacon Act, many complaints were voiced by opponents of the bill that uncontrolled power was being granted to administrative officials.[47] It is significant that, in answer to these arguments, no reference was made to the corrective powers of the courts; the countervailing contentions were merely that the Secretary of Labor would be fair and would follow the standards laid down, and that it was necessary to grant the power.[48] The course of the bill through Congress reveals the same history; complaints by opponents of the "dictatorial" powers given to the Secretary [49] with respect to wage determinations met with no references to judicial review by the bill's advo-

[46] Hearings before the Committee on Education and Labor, U. S. Senate, 74th Cong., 1st Sess., on S. 3055; Hearings before the Committee on the Judiciary, House of Representatives, 74th Cong., 1st Sess., on S. 3055 (Serial 12, Part 1); Hearings before a subcommittee of the Committee on the Judiciary, House of Representatives, 74th Cong., 2d Sess., on H. R. 11554 (Serial 12, Part 2).

[47] Hearings on H. R. 11554, *supra*, pp. 216 (Secretary "absolute dictator"), 251, 253–257, 264–265, 274, 299, 307, 311, 328, 371, 410, 425, 459, 487.

[48] Hearings on H. R. 11554, *supra*, pp. 216, 218–219, 260, 285, 375; *cf.* Hearings on S. 3055, House of Reps., pp. 114–115.

[49] 80 Cong. Rec. 10003–10004, 10006, 10007, 10019. These remarks were made during the consideration of the amendment providing for the determination of "prevailing minimum wages." See also 79 Cong. Rec. 12896.

cates.[50] This is particularly significant, since Senator Walsh, the sponsor of the Act in the Senate, was quick to mention judicial correction of errors made by administrative officials in imposing penalties for violation of the stipulations contained in his contract.[51]

There is nothing in the legislative history of Section 5 itself to indicate that it was intended to apply to the quasi-legislative determinations of wages. It seems to have been inserted to insure to contractors asserted to have breached the stipulations required by the Act and subject to its penalties, a quasi-judicial hearing.[52] The substitution of support by "the preponderance" of the evidence for support by "the evidence," to make findings of fact under Section 5 conclusive in the courts, is quite consistent with the view that the section applies to adjudications of violations, after which follow the penalties authorized by Sections 2 and 3. But it is obviously wholly contrary to the uniform Congressional trend with respect to the weight to be given to quasi-legislative findings of administrative agencies.

Finally, it should be noted that it would be inappropriate to read into the Public Contracts Act

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[50] Sen. Rep. 1157, 1193, 74th Cong., 1st Sess.; H. Rep. 2946, 74th Cong., 2d Sess.; 79 Cong. Rec. 12074, 12245, 12716, 12718, 12726, 12730, 12774, 12780, 12791, 12794, 12876, 12883-12896; 80 Cong. Rec. 10001-10026, 10201, 10537.

[51] 79 Cong. Rec. 12723.

[52] Senator Walsh's interest in this type of protection is clear from the debates, 79 Cong. Rec. 12723.

judicial reviewability of wage determinations. *Butte, Anaconda & Pac. Ry. Co.* v. *United States*, 290 U. S. 127; *Work* v. *Rives*, 267 U. S. 175. As in the two cases cited, the present case concerns the strictly nonregulatory functions of Government. This fact sharply distinguishes it from *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, where the determination of the Interstate Commerce Commission was part of a "regulatory scheme." Judicial review, accordingly, was appropriate, even though not specified in the statute.

D. THE RESULT OF PERMITTING RESPONDENTS TO MAINTAIN THIS ACTION WOULD BE SERIOUSLY OBSTRUCTIVE TO NONREGULATORY GOVERNMENT ACTIVITIES WHICH ARE NECESSARY TO ITS GENERAL FUNCTIONING

In the previous subdivisions of this part of our brief, we have taken up, one by one, the various bases upon which the respondents attempt to ground their right to bring this action. There are highly important practical considerations bearing on the respondents' standing to sue which affect equally all of the sources from which they seek to derive rights. While respondents phrase their right as a right "to bid and negotiate for Government contracts free from unauthorized conditions," it has been shown that *in fact* they are claiming a right to judicial review of the award of Government contracts; their right merely to bid free from allegedly unlawful conditions is empty unless they can free the awarding from such conditions, and, in any case, their right to bid on whatever basis

they choose has not been denied them. As we will show in this section of our brief, the results of permitting actual bidders or prospective bidders to obtain judicial review of the process of awarding Government contracts would be very disturbing to these nonregulatory, purely proprietary, Government purchasing and contracting activities. These activities, underlying and essential to all Government functioning, can even less appropriately than disbursements of Government funds be subjected to judicial review. Cf. *Massachusetts* v. *Mellon*, 262 U. S. 447.

The Government, in the course of the performance of its various functions, must enter into innumerable contracts for services and supplies[53] and it requires no detailed exposition to demonstrate that, should the power of contracting officers expeditiously to acquire supplies be curtailed, practically every function of the Government would be seriously hampered or crippled.[54]

By a number of statutes Congress has blocked out the broad outline of policies which are to be

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[53] There are filed in the General Accounting Office over a million Government contracts each fiscal year. Annual Report of the Comptroller General for the Fiscal Year ended June 30, 1939, p. 28.

[54] Revised Statutes 3735 (41 U. S. C. § 13) limits contracts for supplies for the departments to one year. It is clear that the Government requires an evenly flowing stream of supplies if it is to function smoothly. Often it is necessary that materials be furnished on a regular schedule and a delay in the procurement of some relatively insignificant article may throw an entire program out of schedule.

followed in the performance of Government contracts, and has placed the duty upon Government officers to carry these policies into effect. For example, in the Public Contracts Act, here under discussion, it is necessary for the contracting officer to determine that the contract in question is in an amount of $10,000 or over, and that it calls for an article which is subject to the provisions of the Act. The Davis-Bacon Act, as amended, c. 825, 49 Stat. 1011, 40 U. S. C. § 276a, necessitates the determination of the prevailing wages where construction contracts are involved. It is also necessary to determine that the contract in question is primarily a construction contract, and not one involving materials and supplies to which the Public Contracts Act is applicable. The "Eight-Hour Day" Act of June 19, 1912, c. 174, 37 Stat. 137 (40 U. S. C. 324, 325), provides that there be included in certain types of contracts a provision that no workman should be employed more than eight hours in one calendar day. There are certain exceptions to the "Eight-Hour Day" Act, such as those relating to articles which may be purchased in the open market. The contracting officer is compelled to interpret the law when he decides as to whether the article contracted for falls within an exception to the Act. The "Buy American" Act of March 3, 1933, c. 212, Title III, 47 Stat. 1520 (41 U. S. C. 10 (a)), provides for the use of articles produced in the United States in the performance of Government contracts unless the head of the department concerned shall determine the use of such articles

to be incompatible with the public interest because the same are not manufactured or produced in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or that such purchase would unreasonably increase the cost. Here again, the discretion of governmental officials must be exercised. Many close decisions must necessarily be made and it cannot be assumed that in every instance a contracting officer reaches the same conclusion as would a disappointed bidder or as would a court. That reasonable persons may disagree as to the legality of the action of a contracting officer is evidenced by the number of instances in which unsuccessful bidders have vigorously protested the action of contracting officers and also by the number of instances in which the decisions of such officers have been overruled on administrative appeal (*infra*, p. 66, n. 56).

There are also many provisions frequently placed in Government contracts or specifications for the insertion of which no express statutory authority exists. These provisions require, *inter alia*, that the Government will receive the benefit of any general price reduction; that the contractor will not advertise the fact that he has a contract with the United States unless he states the specific items covered by the contract; that he agrees to inspection and tests of his products as a condition precedent to having his bid considered; that he is precluded from furnishing a substitute for the

article contracted for. Other provisions in the invitation to bid frequently exclude potential bidders who might otherwise qualify. Typical of these are invitations to bid where several items are listed and the award is made for the aggregate of such items and the prospective bidder cannot produce one of the items; where the contractor's plant is so situated that he cannot meet the time schedule of deliveries; where the specified manner of packing and packaging is so materially different from that ordinarily employed by him that he could not comply with such provision; and where a performance bond is required in an amount which he is unable to furnish. It is, of course, obvious that if any of these requirements, considered in conjunction with a specific contract, violate any of the statutes regulating Government contracts, the contracting officer is not acting in accordance with law, and is exceeding the discretionary power which ordinarily might be conceded to be vested in him.'

R. S. § 3709 is a frequent source of legal problems and difficulties. Questions constantly arise within the departments as to who is the lowest responsible bidder, and as to whether the specifications have been fairly drawn.[55] The procedure followed at the

[55] It is constantly being asserted that specifications are so drawn as to preclude a specific potential bidder who maintains that his product would serve equally well as the article specified, or where the potential bidder maintains that the specifications, in effect, unnecessarily require a proprietary article, or are otherwise unduly restrictive, See, e. g., Cf. *Colorado Paving Co.* v. *Murphy*, *supra*, p. 40.

present time, whether it involves an unsuccessful bidder or one dissatisfied with the narrowness of the specifications, is exclusively administrative. It involves either an appeal to the department concerned in order that the specifications may be modified, or the award reconsidered, or an appeal to the Comptroller General, who thereupon investigates the matter.[56] See, e. g., 38 Op. A. G. 555 (1937); 14 Comp. Gen. 518 (specifications for a motor truck, requiring that spare tire be placed in fender well, violate R. S. § 3709); 15 Comp. Gen. 974 ("de luxe" auto specifications, specifying built-in trunk, safety glass, etc., violate R. S. § 3709); 15 Comp. Gen. 1023 (bids for overhauling airplane engines can not be restricted to the manufacturer and companies approved by the Bureau of Air Commerce); 5 Comp. Gen. 776.

The decision of the court below stands for the proposition that an actual or a prospective bidder may maintain a suit against a Government con-

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[56] While the Comptroller General has no specific authority in this regard, his power to disallow the accounts of a disbursing officer results in his recommendations being almost universally followed. We are advised that an expeditious determination is reached in this manner as the majority of the complaints are in respect of R. S. § 3709, and are disposed of within two to four weeks from the time they are filed with the General Accounting Office. See Appendix E, *infra*, pp. 65–66, summarizing the instances during a single year wherein the Comptroller General was called on for an advance opinion with respect to the legality of specification or awards.

tracting officer enjoining the inclusion of certain provisions in the specifications for a contract, or enjoining the awarding of the contract upon the basis of such provisions in the specifications, upon the ground that the specifications are invalid, or that the contracting officer's action in awarding the contract was illegal, or arbitrary and capricious. It is not surprising that the great majority of the decisions (*supra*, pp. 36–41) recognize no right to maintain such an action.

To recognize a right of bidders, actual or prospective, to obtain judicial review of such questions will invite an unlimited number of suits by disappointed bidders or would-be bidders, claiming that the specifications were illegally or arbitrarily established or favored one group of bidders or another, or that the award of a contract is invalid for like or other reasons. The multitude and complexity of the factual, legal, and discretionary problems which the courts would have to scrutinize are apparent. Such considerations are highly appropriate in deciding whether the right asserted by the respondents should now be recognized, and in determining the propriety or impropriety of judicial review. Cf. *Louisiana* v. *McAdoo*, 234 U. S. 627, 631–32; *United States* v. *Nat. Surety Corp.*, No. 236, this Term.

The probable effect of recognizing the right respondents assert upon the ordinary, basic, and nonregulatory contracting activities of the Gov-

ernment is equally clear.[57] If the right is held to exist, the letting of public contracts for essential Government services and supplies is likely to be delayed, hindered, and obstructed by suits to enjoin the inclusion of particular provisions in specifications or to enjoin awards. No such right has ever been recognized under existing federal law; it would be remarkable if it should be held that the Public Contracts Act has brought such a right into existence.[58] Certainly no intention to create such a

[57] *Cf. Bancamerica-Blair Corp.* v. *State Highway Com.*, 265 Ky. 100, 95 S. W. (2d) 1068 (1936); *Riker* v. *Oakland Circuit Judge*, 138 Mich. 181, 101 N. W. 229 (1904); *M'Cafferty* v. *Glazier*, 10 How. Prac. 475 (N. Y. 1854).

[58] A number of the states have passed statutes analogous to the Public Contracts Act and the Davis-Bacon Act. Only one of them out of fourteen provides for judicial review of prevailing wage determinations. Ariz. Rev. Code (Supp. 1936), c. 63–A, §§ 2755b to 2755 (no judicial review); Cal. Labor Code (1937), §§ 1770–1781 (no judicial review); Col. Stats. Anno. (1935), c. 97, § 257 (decision of the industrial commission "conclusive on all parties"); Conn. Gen. Stats. (Supp. 1939), § 793e (no judicial review); Del. Rev. Code (1935), § 3650 (no judicial review); Fla. Comp. Gen. Laws (Permanent Cum. Supp.), § 1365 (5) (no judicial review); Ind. Stats. Ann. (Burns), §§ 53–301 to 53–305 (no judicial review); Mass. Gen. Laws, c. 149, §§ 26, 27, 27A (probably no judicial review, but *cf.* c. 149, § 9); N. J. Rev. Stats. (1937), §§ 34:10–1, 34:11–1 (no judicial review); N. Mex. Laws of 1937, c. 179 (no judicial review); N. Y. Labor Law, § 220 (8) (expressly subject to judicial review); Ohio Gen. Code (Page), §§ 17–3 to 17–6 (no judicial review); Tex. Ann. Stats. (Vernon), art. 5159A (no judicial review); Utah Rev. Stats. (Supp. 1939), § 76B–O–1 (no judicial review).

right can be imputed to Congress in the absence of a clear and compelling manifestation of such intent.[59]

With respect to the delay and obstruction of Government business, no distinction can be drawn between suits by prospective bidders to set aside specifications (as in the instant case) and suits by unsuccessful bidders to enjoin awards of contracts.[60] A challenge directed against specifications would be fully as obstructive as the latter type. Such a challenge makes it necessary for the Government to determine whether new specifications, not open to objection, could be framed which would accomplish the desired purpose, or whether to delay procuring the supplies or services until after the outcome of litigation, or whether the necessity for speedy procurement dictates a surrender to the challenge and abandonment of the purpose which the allegedly objectionable specifications were intended to achieve. In the instant case, the Government felt obliged to adopt the third course. Contracts for iron and steel products have been

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[59] In one instance, Congress has specifically authorized judicial review of the award of contracts. Act of July 2, 1926, c. 721, 44 Stat. 780, 788–89 (award of contracts for aircraft, etc., to lowest responsible bidder). Under well-settled principles, this express provision for judicial review with respect to a particular class of contracts negatives review with respect to contracts generally.

[60] The respondents suggest by implication such a distinction (Br. in Opp., pp. 4–5). *Cf.* Note (1940), 49 Yale L. J. 548, 555–56.

advertised and let without incorporating the enjoined prevailing-wage specifications, because the necessity for prompt procurement outweighed all other considerations.[a]

It is as necessary for the Government to buy and to contract as it is for the Government to tax. The ordinary functions of the Government, to say nothing of the needs for national defense, cannot be carried on without buildings, furnishings, and supplies. The purchasing and contracting activities of the Government are in no sense regulatory in character and do not subject individuals or private interests to any restraint. It would be an entirely novel principle, and a serious threat to the efficient and flexible functioning of the Government, if the courts should undertake to interfere with or control the Government's purchasing activities. If a single disgruntled merchant, dissatisfied with regulations governing eligibility to

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[a] The respondents' argument (Br. in Opp., pp. 4–5, notes 5 and 6) that the present proceeding has not obstructed the Government's contracting activities is obviously fallacious. Of course, the injunction has not *prevented* such activities, because the necessity for procuring steel products is so compelling that contracts are being let *without* the specifications and stipulations which have been enjoined. Clearly the fact that the Government has bought steel in greater quantities, since the injunction was issued than theretofore is utterly irrelevant, as is the circumstance that the prevailing wage determination at first (prior to the issuance of the injunction) diminished competition because many potential bidders were challenging it, and consequently there were fewer bidders.

bid or to obtain an award, may, by invoking the aid of the courts, tie up or hamper the purchasing activities of the Government, the consequences are likely to be far-reaching and serious. The respondents' standing to sue must, therefore, be denied on the familiar grounds stated by Chief Justice Taney in *Decatur* v. *Paulding*, 14 Pet. 497, 516:

> The interference of the courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them.

Compare *Keim* v. *United States*, 177 U. S. 290, 292–293, 296; *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163, 184.

II

THIS SUIT IS AGAINST THE UNITED STATES, WHICH HAS NOT CONSENTED TO BE SUED

It is axiomatic that the United States cannot, without its consent, be sued in any court. It is equally well settled that whether the suit is against the United States turns upon the substantial effect of the decree and not the presence of the United States as a formal party to the action. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296.

From these undisputed premises it would seem naturally to follow that this action, directed against

six heads and three other high officials of departments of the United States, in their official capacity as well as individually, transgresses the immunity of the Government of which they are officers. To this proposition the respondents, and the court below (R. 395–7), find a ready answer in the allegations of the bill of complaint that the petitioners have exceeded, or intend to exceed, the authority granted to them by the Public Contracts Act. It is argued that the sovereign's immunity has never been allowed to shield an official who has acted contrary to his statutory or constitutional authority. Such an official, it is insisted, is sued as a private wrongdoer invading recognized rights and is unable to justify his actions by recourse to authority validly conferred.

The long history of suits against the United States and its officers shows with abundant clarity that neither of the simple analyses suggested in the preceding paragraph can be accepted without more. In the following pages we advance those principles which seem most nearly to rationalize the not wholly consistent decisions in this field.

In brief, we urge: (a) The officer cannot be sued unless he has exceeded his authority, but that alone does not establish that the suit is not against the Government. (b) A suit to compel performance of Government contracts, or to strip the Government of title to or possession of property, is one against the United States regardless of the officer's authority. (c) So, too, any suit which obstructs

the general activities of the Government, beyond the action challenged by the plaintiff, is one against the United States. (d) But a suit which seeks to restrain an unauthorized *regulation* by an officer, or which does not seek a determination of title to or possession of property binding against the United States, is a suit not against the Government but only against the officer who has exceeded his authority.

A. THE ALLEGATION THAT THE PETITIONERS ARE ACTING BEYOND THEIR STATUTORY AUTHORITY DOES NOT DISPOSE OF THE QUESTION OF SUIT AGAINST THE UNITED STATES

It is clear enough that unless the officer acts in excess of his statutory or constitutional authority, he cannot be sued at all. *Yearsley* v. *Ross Construction Co.*, No. 156, this Term. It seems equally clear that satisfaction of this condition precedent to the suit is not determinative of the further question of whether the suit is in substantial effect one against the United States. Many suits against officials to undo action alleged to be in excess of their authority have been recognized to be in reality directed against the United States or a State.[82]

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[82] *Louisiana* v. *McAdoo*, 234 U. S. 627; *Goldberg* v. *Daniels*, 231 U. S. 218; *Morrison* v. *Work*, 266 U. S. 481; *Louisiana* v. *Garfield*, 211 U. S. 70; *New Mexico* v. *Lane*, 243 U. S. 52; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Nagano* v. *Hitchcock*, 202 U. S. 473; *Lankford* v. *Platte Iron Works*, 235 U. S. 461; *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Boeing Air Transport, Inc.*, v. *Farley*, 75 F. (2d) 765 (App. D. C.),

In *Louisiana* v. *McAdoo*, 234 U. S. 627, the Secretary of the Treasury was charged with illegally, arbitrarily, and unjustly imposing too low a tariff on Cuban sugar, contrary to the applicable statutes. The plaintiff in *Goldberg* v. *Daniels*, 231 U. S. 218, alleged that the Secretary of the Navy was refusing, in direct contravention of the statute, to deliver a vessel purchased by him. *Morrison* v. *Work*, 266 U. S. 481, involved claims that certain statutes under which defendants were purporting to act were unconstitutional, and further claims that the defendants in any event were exceeding their granted authority. In *Oregon* v. *Hitchcock*, 202 U. S. 60, the Secretary of the Interior was asserted to have acted under a misconstruction of statutes of Congress relating to lands allotted to the state, and in *Naganab* v. *Hitchcock*, 202 U. S. 473, he was said to be acting under an act unconstitutionally depriving the plaintiff of his property without due compensation.

In these illustrative cases, as well as in the others cited, the official against whom the proceeding was brought was alleged to be acting illegally, yet, in each case, the plaintiff's suit was barred by the immunity of the United States from suit. It seems clear that something more than a charge that the officer is acting in excess of his authority is needed to maintain the suit. This further question must

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certiorari denied, 294 U. S. 728; *Transcontinental & Western Air, Inc.*, v. *Farley*, 71 F. (2d) 288 (C. C. A. 2d), certiorari denied, 293 U. S. 603.

be answered in terms of the relief sought. As the Court said in *Cramp & Sons* v. *Int. Curtis Marine Turbine Co.*, 246 U. S. 28, 40:

> the right to proceed against an individual, even although an officer, to prevent a violation of the Constitution did not include the right to disregard the Constitution by awarding relief which could not rightfully be granted without impleading the United States, or, what is equivalent thereto, without interfering with the property of the United States possessed or used for the purpose of its governmental functions.

The succeeding sections of this point explore the types of relief prayed which have been held to contemplate a suit against the United States and those which have been held to be directed at the individual officer alone. From that analysis it seems plain that the present suit is directed against the Government, not the petitioners alone.

B. A SUIT SEEKING TO CONTROL THE TERMS OF PERFORMANCE OF GOVERNMENT CONTRACTS OR SETTLING THE TITLE OR ENJOYMENT OF GOVERNMENT PROPERTY IS BROUGHT AGAINST THE SOVEREIGN

1. The contracts from which respondents would delete, by judicial action, the clauses relating to minimum wages will be contracts of the United States, and of the United States alone. In setting the specifications and terms, and in entering into the agreements, the petitioners will secure no private interests of their own; they will act solely in their official capacity—as the complaint itself

many times recognizes—and on behalf of the Government alone.

The direct and immediate effect of granting the relief sought by respondents has been, and will continue to be, to fix the terms and conditions of Government contracts. This effect is neither collateral nor accidental, but it is the very thing sought by the respondents. Regardless of the legality of the Acting Secretary's determination, the Court can sanction the relief granted below only by approval of an interference with the formation and content of contracts of the United States. But it is settled that, without the consent of Congress, there can be no such interference.

If the concept of "suit against the United States" is to have any content in cases where the United States is not formally a party, surely those proceedings in which control over the terms of government contracts (or the enjoyment of government property) is asked fall well within its boundaries. Such, certainly, is the teaching of the decisions.

It is uniformly held that a suit for an injunction or mandamus specifically to enforce a contract of the United States or of a state transgresses the immunity from suit.[63] It is immaterial that in re-

[63] *Wells* v. *Roper*, 246 U. S. 335; *Ex parte State of New York*, 256 U. S. 490, 500; *Louisiana* v. *Jumel*, 107 U. S. 711; *In re Ayers*, 123 U. S. 443, 502–503 (see *Ex parte Young*, 209 U. S. 123, 151–152–189); *Goldberg* v. *Daniels*, 231 U. S. 218; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. (2d)

fusing to perform the contract the official sued may be acting contrary to statute or the constitution.[64] This is so because, regardless of the extent to which the defendant may be exceeding his valid authority, it is the United States or the state which would have to perform the contract and carry on the activities which will fulfill its terms.

Here, too, it is only the United States, and not the individual petitioners, which is in fact affected by the injunction. It is the contracts of the United States, not of the petitioners, from which the minimum wage terms will be excised. This incontestable fact is, of course, recognized by the respondents who, at the same time that they strenuously maintain that the petitioners are to be treated as private individuals, proceed against them in their official capacity (R. 2, 9–12, 38–44) and ask that contracts of the United States be freed from the requirements to which they object (R. 38–44). It is pertinent to recall the many decisions, holding proceedings to be against the sovereign, which

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288 (C. C. A. 2d), certiorari denied, 293 U. S. 603; *United States ex rel. Shoshone Irr. Dist.* v. *Ickes*, 70 F. (2d) 771 (App. D. C.), certiorari denied, 293 U. S. 571; *Johnstown Coal & Coke Co.* v. *Wilson*, 60 F. (2d) 557 (E. D. N. Y.); *Plain* v. *Horne*, 196 Fed. 582 (Idaho); see *Hopkins* v. *Clemson College*, 221 U. S. 636, 642.

[64] *Louisiana* v. *Jumel*, 107 U. S. 711; *Goldberg* v. *Daniels*, 231 U. S. 218; *In re Ayres*, 123 U. S. 443; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. (2d) 288 (C. C. A. 2d), certiorari denied, 293 U. S. 603; *Boeing Air Transport, Inc.* v. *Farley*, 75 F. (2d) 765 (App. D. C.), certiorari denied, 294 U. S. 728.

stress the official character with which the plaintiffs must of necessity endow the defendants in order to secure relief. *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Belknap* v. *Schild*, 161 U. S. 10; *Wells* v. *Roper*, 246 U. S. 335.

The same logic, it may be observed, has prevailed in a number of the cases which have held suits by an allegedly lowest responsible bidder to set aside the award of a public contract to a competitor to be suits against the state.[65]

Thus, under settled principles, the present suit must be dismissed as one brought against the United States, in that it seeks to control the terms and performance of contracts with the Government.

2. For the sake of completeness of analysis, it may be appropriate to point out a cognate type of relief the prayer for which converts a suit nominally against an officer into one against the United States. This class of actions, equally obviously directed against the Government, is that in which the relief granted or sought will finally determine or interfere with the title, possession, or use of government property.[66]

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[65] *Johnstown Coal & Coke Co.* v. *Wilson*, 60 F. (2d) 557 (E. D. N. Y.); *Peoples* v. *Byrd*, 98 Ga. 688, 25 S. E. 677 (1896); *Herald Pub. Co.* v. *Klamath Falls Pub. Co.*, 116 Ore. 62, 240 Pac. 244 (1925); *Mills Publishing Co.* v. *Larrabee*, 78 Iowa 97, 42 N. W. 593 (1889); see *Butler* v. *Printing Commission*, 68 W. Va. 493, 497, 70 S. E. 119, 121 (1911).

[66] A United States official cannot be enjoined from infringing a plaintiff's valid patent, through the use of prop-

C. SUITS THE EFFECT OF WHICH WILL BE TO INTERFERE SERIOUSLY WITH THE GENERAL ACTIVITIES OF THE GOVERNMENT ARE BROUGHT AGAINST THE SOVEREIGN

There is yet another type of suit against officials alleged to be acting in excess of their authority which must be held in fact to be brought against the Government. If the relief sought will reach beyond the plaintiff's grievance and will interfere

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erty owned or leased by the United States. *Belknap* v. *Schild*, 161 U. S. 10; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *McCreery Eng. Co.* v. *Mass. Fan Co.*, 180 Fed. 115 (C. C. Mass., 1910). The Secretary of War, the Court held in *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222, cannot be required to turn over a naval vessel alleged to have been validly sold to the claimant since "The United States is the owner in possession of the vessel. It cannot be interfered with behind its back, and as it cannot be made a party, this suit must fail." Attempts to establish title to public lands by bills of injunction against the Secretary of the Interior or Commissioner of the General Land Office must fail. *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Oregon* v. *Hitchcock*, 202 U. S. 60; *New Mexico* v. *Lane*, 243 U. S. 52; *Louisiana* v. *Garfield*, 211 U. S. 70; see *Work* v. *Louisiana*, 269 U. S. 250, 254, 261. So must attempts to control the management and disposition of lands, or their proceeds, ceeded to Indian tribes but in the possession of the Government, *Morrison* v. *Work*, 266 U. S. 481, 485. An action by a bank depositor to compel state agencies to make payments from, or levy assessments for, a Depositors Guaranty Fund, the title of which was in the State, will be denied. *Lankford* v. *Platte Iron Works*, 235 U. S. 461. Nor may state creditors obtain payment of state funds. *Louisiana* v. *Jumel*, 107 U. S. 711. And landholders may not foreclose a mortgage on a railroad which had been sold to the State in proceedings alleged to be void. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446. See also *Leather* v. *White*, 266 U. S. 592, affirming 296 Fed. 477 (C. C. A. 7th).

with those basic activities necessary to sustain the Government and to enable it to function, the suit is in truth brought against the Government itself. In *Louisiana* v. *McAdoo,* 234 U. S. 627, 632, this Court held that to allow a domestic sugar producer to sue to enjoin the Secretary of the Treasury from collecting less than the alleged legal tariff on sugar imported would "obviously * * * operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom," and would "clog the wheels of government." For this reason, it was concluded that "such suits would obviously, in effect, be suits against the United States." Cf. *Morrison* v. *Work,* 266 U. S. 481.

Respondents doubtless will argue that this is not such a case, and that they seek only to bid for Government contracts without regard to the challenged specifications. But we have already shown that respondents seek in fact to control the award of Government contracts (*supra,* pp. 41–44, 61) and that if this suit can be maintained so, too, may any disgruntled bidder obtain the aid of a court of equity against completion of contracts with others (*supra,* pp. 41–43, 61, 66). And we have sketched the far-reaching consequences which such a rule might work upon the contracting and purchasing functions of the Government (*supra,* pp. 62–70). This case, for the reasons earlier developed, thus seems well within the doctrine of *Louisiana* v. *McAdoo, supra.*

D. THE CASES RELATING TO THE REGULATORY ACTIVITIES OF THE GOVERNMENT, OR WHERE THE RELIEF DOES NOT SETTLE THE TITLE TO OR POSSESSION OF THE UNITED STATES, ARE INAPPLICABLE

Respondents hitherto have not met the cases or the doctrines which have been discussed above. They have, instead, based their argument upon two lines of cases, neither of which has any application to the issues at bar.

1. Proceedings against officials which involve solely the regulatory functions of the government cannot ordinarily be said to be directed against the sovereign or to require that it be made a party. In this category fall most of the classic decisions permitting suits against officers to enjoin action under an unconstitutional statute or in excess of valid authority.[47]

In these cases, it is unnecessary to go beyond the simple fact that the defendant officials have acted in excess of their authority. In theory, at least, no interest of the state, as contrasted with those of the individual who is being sued, is involved. If the statute is unconstitutional, the unlawful act is not the wrong of the state but "is the mere wrong and trespass of those individual persons who falsely speak and act in its name." *Poindexter* v. *Green-*

[47] *Ex parte Young*, 209 U. S. 123; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Waite* v. *Macy*, 246 U. S. 606; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Gegiow* v. *Uhl*, 239 U. S. 3; *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Allen* v. *B. & O. R. Co.*, 114 U. S. 311.

how, 114 U. S. 270, 290; *Ex parte Young*, 209 U. S. 123, 151; *In re Ayers*, 123 U. S. 443, 507. If the statute does not justify his action, it is evident that the defendant cannot defend his conduct by reliance upon his governmental authority and the relief granted does not affect in any manner the proprietary or contractual interests of the state. While the suit would otherwise affect the governmental interest in the enforcement of the law, this interest may, broadly speaking, be said by definition to be nonexistent when the statute is challenged as unconstitutional; the government, that is, has no proper interest in enforcing an invalid law.

We recognize that, if the action be valid, the immunities of the federal government are not to be varied according as the action is characterized as "proprietary" as distinguished from "regulatory." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466. But the distinction which we seek to draw is simply between the governmental interests affected by granting the relief sought. The Government has an interest in its property or contracts even if they relate to an invalid law;[*] it may be supposed to have none in the enforcement of an invalid regulation.

It is unnecessary here to consider whether those cases allowing relief against enforcement of invalid laws are consistent with the general doctrine of

[*] See *Kay* v. *United States*, 303 U. S. 1; *United States* v. *Kapp*, 302 U. S. 214, 217.

immunity from suit. We suggest the analysis which may be taken to justify the result, simply to show that respondents can claim no benefit under this doctrine. Plainly enough, the Government's interest in this suit springs not alone from a desire that the law be obeyed but also from its impact upon its contracting and purchasing functions.

2. There have, it is true, been cases where suit against the officer was allowed although the property interests of the Government were to some extent involved. But, it is important to note, in none of these decisions did the relief undertake conclusively to determine the title to or possession of the Government and in none was the contracting activity of the Government subjected to the control of the Court. Accordingly, respondents, who seek to have the Court rewrite the Government's steel contracts, can gain no comfort from these decisions.

(a) Certain actions to recover property have been allowed where they were directed solely against the defendant as a private common-law tort-feasor.[49] Such judgments, as the courts have

[49] *United States* v. *Lee*, 106 U. S. 196, 210, 219 (ejectment to recover possession of Arlington cemetery from two army officers); *Tindal* v. *Wesley*, 167 U. S. 204 (ejectment against individual alleged to be in possession of land as a state official); *Scranton* v. *Wheeler*, 179 U. S. 141, 152 (ejectment); *Poindexter* v. *Greenhow*, 114 U. S. 270 (detinue for personal property alleged to be destrained by defendant for delinquent taxes); *Goltra* v. *Weeks*, 271 U. S. 536 (injunction to prevent trespass); *Noble* v. *Union River Logging*

often recognized, do not bind the sovereign in any way; no plea of *res adjudicata* against a state can be based upon them. As the Court said in *Tindal* v. *Wesley*, 167 U. S. 204, 223:

> The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim.[70]

R. Co., 147 U. S. 165 (trespass on plaintiff's vested right of way); see *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 452 (explaining *United States* v. *Lee* and other cases as involving merely suits for personal torts). Cf. *Cammeyer* v. *Newton*, 94 U. S. 225, 234, holding an official personally liable in damages for patent infringement while doing government work; contrast *Belknap* v. *Schild*, 161 U. S. 10, *supra*, holding that a suit to enjoin an official from infringing a patent on behalf of the government was a suit against the United States. In the former case, a judgment would not affect any interest of the United States, while in the latter it obviously would.

[70] See, also, *Scranton* v. *Wheeler*, 179 U. S. 141, 152; *United States* v. *Lee*, 106 U. S. 196, 217, 222; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 452; *Carr* v. *United States*, 98 U. S. 433; *Hussey* v. *United States*, 222 U. S. 88, 93.

It seems evident, since, as we have shown above in Point I, none of the petitioners can be said to have committed any private tort against the respondents, the decisions in this group of cases cannot support an action against them.

(b) In other cases, in which the proceedings are not cast into the form of common-law private actions, relief is still available because to grant it will not interfere with the protected interests of the state. Upon the granting of an injunction in *Work* v. *Louisiana*, 269 U. S. 250, compelling the Secretary of the Interior not to consider the mineral character of lands in determining whether they were swamp lands granted to Louisiana, no property interest of the United States was directly affected—title, use, and possession of the lands remaining as before, and the Secretary was authorized to reach a decision as to title upon any other ground. The relief granted may have changed the action of the Secretary, but it did not change the position of the United States or affect its interests.[11] Similarly, the mandamus issued in *Garfield* v. *Goldsby*, 211 U. S. 249, to prevent the Secretary's striking the plaintiff's name from the rolls as an approved member of a certain tribe (which membership carried with it certain privileges to select land) had no direct, immediate, or contemporaneous effect upon the interests of the United States

[11] To the same effect, see *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228, 238; *Payne* v. *New Mexico*, 255 U. S. 367, 373; cf. *Santa Fe Pac. R. R. Co.* v. *Fall*, 259 U. S. 197.

in the public lands. The same is true of an injunction to prevent the Secretary from insisting that plaintiff pay the whole (rather than half) the cost of surveying lands allotted to it. *Santa Fe Pac. R. R. Co.* v. *Lane*, 244 U. S. 492. In *Lane* v. *Watts*, 234 U. S. 525, it was apparently conceded that if title was not in the United States on the face of the bill, the suit was not directed against the United States (pp. 536–537), and the Court came to that conclusion (p. 540); in that posture of the case, the defendants were merely casting a cloud on plaintiff's valid preexisting title. *Ickes* v. *Fox*, 300 U. S. 82, rested upon a decision by the Court that the United States had in fact no property interest to protect or contractual obligations to perform.

In *Colorado* v. *Toll*, 268 U. S. 228,[72] the State's claim rested on its assertion that certain rights in the lands and roads did not belong to the United States; a determination in its favor would necessarily prevent an injunction from affecting United States property. In *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135 (cf. *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163), the jurisdiction of the court was conceded (p. 143), and, since the Court found the acts of the defendant fully authorized, it was unnecessary to consider whether the suit was against the United States.

[72] Suit to enjoin the Superintendent of Rocky Mountain National Park from enforcing certain regulations relating to the government of the Park, especially regulations concerning the use of the highways.

In these three cases the actions were brought by states. They may well rest on a special right of a state, asking to have jurisdictional doubts resolved in its favor, to sue in cases which might otherwise be held to be directed against the United States. Cf. *Missouri* v. *Holland*, 252 U. S. 416, with *Minnesota* v. *United States*, 305 U. S. 382.

In this manner, the courts have accommodated the competing principles of protecting the Government against involuntary suit and protecting the citizen against any arbitrary official aggression. Certainly, we believe, *no* theory which would permit respondents to maintain this suit can be squared with the historic decisions and policies of this Court.

III

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN EQUITY FOR AN INJUNCTION

Even if respondents have not sought to implead the United States, and even if they have sufficient legal standing to maintain this action, they cannot secure injunctive relief unless they clearly bring themselves within the equitable jurisdiction of the courts.[73]

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[73] That a legal right may have been invaded is not in itself enough to ground relief; nor is it enough that petitioners' action may be found to be illegal or unauthorized. *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, 283; *Indiana Mfg. Co.* v. *Koehne*, 188 U. S. 681, 690; *Northport Power & Light Co.* v. *Hartley*, 283 U. S. 568, 570. In addition, the specific need for equitable relief must always

The complaint, in summary, merely alleges that the respondents are steel manufacturers, some of whom have at times obtained Government contracts on which they have generally realized profits; that invitations to bid on large and important steel contracts will probably be let in the immediate future, on some of which contracts respondents desire to bid at prices sufficient to secure profits; that unless the petitioners are enjoined from requiring the inclusion of a wage stipulation in these contracts, the respondents will suffer immediate, irreparable, and irrecoverable damages in that (1) they will be deprived of the right to bid free of unlawful limitations, (2) if they submit bids including the stipulation they may be estopped from attacking the validity of the determination, and may run the risk of harsh penalties, (3) an increase in their minimum wage rates for common laborers will, as a practical matter, increase the rates of pay for all employees including those not engaged on Government business, (4) if they have to pay the established wages, there is grave danger that they will not be able to compete successfully for government contracts with the larger steel companies, (5) and they have no adequate remedy at law. (R. 36–38, 313, 316–317.)

The injuries alleged are of an entirely speculative character. Respondents can suffer no damage

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be shown to meet the standards of urgency required by the traditional equity practice. *Petroleum Exploration Inc.* v. *Public Service Comm'n.*, 304 U. S. 209, 218.

unless contracts in which they are interested are to be awarded,[74] unless they bid on these contracts, unless they are the lowest bidders, unless they are awarded the contract, unless they profit from the contract if they do get it, and unless they could not make the same profits elsewhere. Even at the end of this chain, with each link only a problematic hypothesis, there is no showing that the loss in profits will be large, either absolutely or in comparison with the respondents' entire business.[75] Injunctions are not issued upon such a tissue of possibilities.[76] Thus, even if there be no legal rem-

[74] The complaint does allege that the respondents desired to bid on certain specific Navy contracts to be let shortly after March 2, 1939 (R. 33–34). Since these contracts have been let these allegations may now be ignored. No other reference to specific contracts in which respondents are interested is made in the complaint.

[75] The complaint contains nothing whatever on the amount of Government business done by respondent South Chester Tube Company (R. 5–6), and respondent Atlantic Wire Company does not allege that it has ever bid on Government contracts (R. 8–9). The allegations of the other respondents simply contain figures as to, or, in one case, the percentage of gross sales to the Government, with a general allegation that respondents have "generally" realized profits on their Government contracts (R. 313).

[76] *Ames & Co.* v. *Wallace*, 1 S. C. D. C. (N. S.) 238, affirmed on other grounds, 81 F. (2d) 414 (App. D. C.); Spelling & Lewis, *A Treatise on the Law Governing Injunctions* (1926), §§ 33, 35, 36; Joyce, *A Treatise on the Law Relating to Injunctions* (1909), § 1069; cf. *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 170; *California* v. *Latimer*, 305 U. S. 255, 260; *Petroleum Exploration, Inc.* v. *Public Service Comm'n.*, 304 U. S. 209.

edy whatever, there can be no relief by injunction for respondents have failed to show any demonstrable injury.

IV

THE PREVAILING WAGE DETERMINATION IS A VALID EXERCISE OF DISCRETION CONFERRED BY THE PUBLIC CONTRACTS ACT

The respondents have directed the bulk of their argument to the proposition that the prevailing wage determination is invalid and beyond the jurisdiction and authority of the Secretary of Labor under the Public Contracts Act (Br. in Opp. pp. 6, 10–18, 20–21, 23–31). As we have shown in the preceding sections of this brief, there is no occasion for the Court to pass upon this question, as the respondents have no standing to maintain this action, because none of their legal rights have been infringed, because the suit is brought against the United States without its consent, and because respondents have suffered no irreparable injury. But, in any case, we believe that their attack upon the wage determination is wholly without foundation.

The primary contention advanced by the respondents is that the Acting Secretary's determination is based upon a misconstruction of Section 1 (b) of the Public Contracts Act, which directs [11]

[11] Section 11 provides that the minimum wage provisions of Section 1 (b) shall be applicable only to contracts relating to such industries as have been the subject matter of a de-

that Government supply contracts shall provide for payment to employees of contractors of:

> * * * not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; * * *

The minimum wage determination for the iron and steel industry establishes six localities in the United States for purpose of the Public Contracts Act, in one of which (comprising thirteen northeastern states, several counties of West Virginia, and the District of Columbia) the respondents' plants are situated. The respondents contend (and the majority of the Court below held) that "locality" as used in the phrase "locality in which the materials * * * are to be manufactured" means a "community," "local center of manufacture," or other small area and does not authorize the Secretary to establish as localities "regions" or "broad geographical areas."

In the lower courts, the respondents also contended that, even if the Public Contracts Act authorizes the designation of localities as large as those designated in the challenged wage determina-

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termination by the Secretary of Labor, and thus insures that the minimum wages shall be determined in advance of the bidding for the contract.

tion, the determination is arbitrary and capricious. The Court of Appeals did not pass on this contention (since it held that in any case the determination is based upon an erroneous construction of "locality"), and the respondents have so far advanced their second contention in this Court only by implication (Br. in Opp. pp. 14–18).

A. THE WAGE DETERMINATION IS BASED UPON A PROPER CONSTRUCTION OF THE PUBLIC CONTRACTS ACT

In support of their contention that the determination rests upon an erroneous construction of the relevant language of the Public Contracts Act, the respondents have put forward two distinct arguments. First, they claim that the intrinsic meaning of the word "locality" is such as to confine the scope of the Secretary's discretion to the designation of small areas, in no event more extensive than a large metropolitan community.[18] Second, the respondents contend that the context and legislative history of the Public Contracts Act show that Congress intended the word to have the restricted meaning for which they argue.

[18] Before the lower courts, the respondents contended that "locality" must be interpreted to mean "the city, county, village, or other civil subdivision of a State in which work under a particular Government contract is to be performed, or the immediate vicinity of that place, or, at most, a small geographical area" (R. 26). The Court of Appeals stated that "in ordinary and common usage locality is synonomous in meaning with such words as place, vicinity, neighborhood, and community" (R. 390).

We believe it is entirely clear that neither of these contentions has any foundation. This Court and other courts have recognized that the word "locality" is one of flexible contours, the precise meaning of which is to be determined by reference to the objectives sought to be achieved and the evils sought to be suppressed by the legislation in which it is used. And, as regards the Public Contracts Act, any limitation of the "locality" unit to "local centers of manufacture" or "communities" will obstruct accomplishment of the very objectives which Congress sought to achieve by this legislation, covering, as it does, the many and varied industries whose products are purchased by the Federal Government.

1. The word "locality" has no such intrinsic meaning as to exclude the geographic units established by the wage determination; it has a flexible and variable meaning depending upon the purpose for which it is used.

The theory upon which the majority of the court below concluded that the intrinsic meaning of "locality" is such as to render the determination invalid because of the size of the localities therein designated is set forth in the prevailing opinion as follows (R. 390–91):

> Popular acceptance and usage accord to the word *locality* connotations of common interest and understanding, such as are revealed in the following expressions: Local self-government, our local schools, local interests, a local concern, local option, local boy makes good, local items as used in news-

> papers, local prejudices, local talent * * * local anesthetic and *location* as used in mining law, and in motion picture parlance. In ordinary and common usage *locality* is synonymous in meaning with such words as *place, vicinity, neighborhood,* and *community.* These words, also, are too indefinite to be used for purposes of exact measurement in terms of acres or square miles. But neither they nor *locality* itself, in any case, connote large geographical areas, with widely diverse interests, such as the fourteen states and the District of Columbia, grouped in the protested determination.

The respondents seek to advance their argument in similar terms (Br. in Opp. pp. 23–24). Both the court below and the respondents contend that, had Congress intended to authorize the designation of large geographic units, a word such as "area" or "region" would have been used in the Public Contracts Act in lieu of "locality" (R. 391; Br. in Opp. pp. 23–24).

In truth, the word has no such necessarily restricted meaning, nor is there such a gulf between the meaning of "locality" on the one hand and "area" or "region" on the other as respondents seek to fix. To be sure, "locality" is often used to denote a small geographic unit, and in appropriate context and circumstances may be given such a meaning.[79] The view of the court below that the

[79] Thus, in legislation requiring building contractors to pay the prevailing wage in the locality where a building is to be erected, the locality in which the work is to be per-

word necessarily and as a matter of law has a meaning of the kind suggested by "location, as used in mining law, or in motion-picture parlance" or by "local anesthetic," or by "neighborhood," or "community," [80] suggests too much faith in the precision of common speech. Certainly it is in sharp contrast to the decisions of this Court and other courts, which recognize that the term "locality" suggests

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formed is known in advance of the bidding to be the area immediately surrounding the construction site, and the term accordingly denotes a small geographical area. Examples of such legislation are the Emergency Relief Appropriation Acts of 1937 (50 Stat. 352, 354, § 2) and 1938 (52 Stat. 809, 812, § 9) and in the Housing Acts of September 1, 1937 (50 Stat. 888, 897) and June 3, 1939 (53 Stat. 807). But, as shown hereinafter, the word is frequently used in other statutes where obviously no such restricted meaning was intended.

[80] Apparently, the Court of Appeals used the word "community" in the sense of a metropolitan community, although the context in which the word was used in the extract cited by the court (R. 391, n. 34) from Holmes, *The Common Law* (p. —), rather clearly indicates that the term was there used to refer to a much broader geographical area within which common political mores prevail. The passage is taken from the lecture on the criminal law and the context is as follows:

"* * * it may be said, not only that the law does, but that it ought to, make the gratification of revenge an object. * * * The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution."

no precise geographical boundaries, and uniformly construe the term to denote varying geographic areas depending upon the framework of the statute in which it is used, the legislative purpose sought to be achieved, and the evils sought to be suppressed. *Connally* v. *General Construction Co.*, 269 U. S. 385; *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627; *Ruark* v. *International Union of Operating Engineers' Union*, 157 Md. 576, 146 Atl. 797 (1929); *Pierce* v. *Dillingham*, 96 Ill. App. 300 (1901); *State* v. *Fremont, E. & M. V. R. R. Co.*, 22 Neb. 313, 35 N. W. 118 (1887).[81]

Connally v. *General Construction Co., supra,* seems conclusive. There this Court held that the Oklahoma criminal statute requiring payment of not less than the "current rate of wages" in the "locality" where work is performed on a state contract involved a denial of due process because of the vague and uncertain boundaries of the unit within which contractors were required to apply the wage standard.[82] According to the Court, it was impos-

[81] See, also, *Metropolitan Water District of Southern California* v. *Whitsett*, 215 Cal. 400, 10 Pac. (2d) 751 (1932); *Murphy* v. *Worcester Consol. Ry. Co.*, 199 Mass. 279, 85 N. E. 507 (1908); *State* v. *Tibbetts*, 21 Okla. Cr. 168, 205 Pac. 776 (1922); *Severance* v. *Murphy*, 67 S. C. 409, 46 S. E. 35 (1902); *People ex rel. Melledy* v. *Shea*, 73 App. Div. 232, 76 N. Y. S. 679 (1902); *Foster* v. *Hart Consolidated Mining Co.*, 52 Col. 429, 122 Pac. 54 (1912).

[82] The constitutional vice of the statute arose from the fact that no provision was made for predetermination of the appropriate boundaries of the locality and each contractor was therefore required to exercise his own discretion in de-

sible to tell "what areas constitute the locality," and the word is "elastic and dependent upon circumstances" (p. 395). It would seem to follow, *a fortiori*, that an administrative agency is possessed of the power to define the term to meet the needs of a particular statute. In the *Connally* case, it may be observed, "area" was used in the opinion in a *more restricted* sense than "locality."

In the *Texas & Pacific case, supra*, the specific question before this Court was whether the ports through which traffic passes into foreign commerce were "localities" within the meaning of Section 3 (1) of the Interstate Commerce Act (Act of Feb. 4, 1887, c. 104, § 3, 24 Stat. 379; 49 U. S. C. § 3), which makes it unlawful for any carrier "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality * * *." The majority of this Court held that ports were not "localities" (because the practices which Congress sought to suppress were not thought to embrace discriminations against intermediate gateway ports), but the opinion clearly indicated that the word should be construed in the light of its context, and that there is no such distinction between "localities" and

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termining those boundaries in order to avoid criminal penalties. Cf. *Metropolitan Water Dist.* v. *Whitsett*, *supra*; *Campbell* v. *City of New York*, 244 N. Y. 317, 155 N. E. 628; *Commonwealth* v. *Daniel O'Connell's Sons*, 281 Mass. 402, 183 N. E. 839. The Public Contracts Act, of course, provides just such a procedure for predetermination of the bounds of "localities."

"areas" as the respondents and the court below urge (p. 638):

> The word "localities," therefore, has its proper office as denoting the origin or destination of traffic and the shipping, producing, and consuming areas affected by rates and practices of carriers.

In the *Kuark case, supra,* the Supreme Court of Maryland considered the meaning of "locality" in a statutory provision requiring contractors, in the execution of contracts for public works within the City of Baltimore, to pay not less than the current rate of per diem wages in the "locality" where the work is performed. A "locality" in a law applying only within a city is obviously a small geographic unit, but the court discarded *a priori* considerations in its treatment of the word, and found no such difference between "locality" and "region" as the respondents here urge (157 Md. at 584-6):

> While "locality" is a word of relative meaning, its context commonly determines its meaning * * * whatever may be the scope of its varying significance, its meaning in a particular statute is susceptible of being determined from the context, since the words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature had in view * * * In other words, "locality" defines a region, with the public undertaking as an axis or focal point, throughout which region the

daily wage of the particular class to which the worker belongs is uniform.

This language assumes added significance in view of the fact that during the course of the hearings on the Healey bill[83] the *Ruark* case was specifically called to the attention of the subcommittee of the House Committee on the Judiciary.[84]

In *Pierce* v. *Dillingham, supra,* the court recognized (p. 313) the variable meaning of "locality" as embracing "a country, a state, a county, a town, or a portion thereof," at the same time observing that the geographic connotations of the term are such that "neither the world nor the greater portion of it is spoken of as a locality."

In each of the cited cases it will be seen that the word "locality" was construed to embrace whatever area was necessary to permit accomplishment of the legislative purpose. Certainly, if this be the case, the Secretary is authorized to read the term with corresponding elasticity in order to meet the needs of the Act.

That common usage does not dictate the intrinsically narrow geographic connotation imposed on

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[83] As indicated *infra*, p. 106, n. 93, 112–114, the Healey Bill (H. R. 11554, 74th Cong., 2d Sess.) differed materially from the bill finally enacted by Congress. The bill in its final form, utilizing the prevailing wage standard and the locality unit, was drafted subsequent to the reference to the *Ruark* case.

[84] Hearings before a subcommittee of the House Committee on the Judiciary, 74th Cong., 2d Sess., on H. R. 11554, p. 532, 538.

"locality" by the Court below [85] is also shown by the use of the word in other federal statutes. For instance, the "rebate" and "undue preference" provisions of the Interstate Commerce Act,[86] which have already been referred to,[87] clearly are designed to protect any "locality," of whatever size, against discrimination. Certainly it would be flying in the face of the statutory policy to hold that discrimination of a "sectional" nature—i. e., against a region comprising several states—is not prohibited, on the ground that "locality" cannot denote a geo-

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[85] Dictionaries commonly give as one of the recognized meanings of "locality" the flexible and variable meaning appropriate in the context of the Public Contracts Act. The New Winston Simplified Dictionary, A Reference Library (1939): "1. A restriction or limitation to a definite place; 2. A general region or position; a vicinity." Funk & Wagnalls' Practical Standard Dictionary (1929): "1. A definite region in any part of space; geographical position. 2. Restriction to a particular place." The Winston Simplified Dictionary for Schools (1938): "A general region, place, or district; neighborhood." Webster's New American Dictionary (1939): "A region, section, or neighborhood." A New English Dictionary on Historical Principles; Oxford, Clarendon Press (1908): "* * * 4. b. A place or district, of undefined extent, considered as the site occupied by certain persons or things, or as the scene of certain activities." Anderson's Law Dictionary, cited in *Pierce* v. *Dillingham*, *supra:* "A particular district; confined to a limited region; opposed to general; limited by boundaries, large or small; as a country, a state, a county, a town, or a portion thereof."

[86] Sections 3 (1) and 13 (4) of the Interstate Commerce Act (49 U. S. C., Supp. IV, Secs. 3 and 13).

[87] *Supra*, p. 97.

graphic unit of such size."[8] On the contrary, these provisions of the Interstate Commerce Act were clearly designed to prohibit every form of discrimination between and among persons, groups, interests, or geographic units."[9] The size of the geographic units protected is by no means limited to "communities"; on the contrary, "areas," "sections," or "regions" of any size are embraced within the meaning of "locality" as used in the statute. *Texas & Pacific Ry. Co.* v. *United States, supra; Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 220, 233. The result is the same under state statutes prohibiting discrimination by carriers, although in such statutes the "localities" must, commonly, be smaller

[8] The administrative construction of these provisions clearly shows that "locality" embraces any geographic unit, of whatever size, although the question is never directly raised, since the statute also protects shippers," and decisions could readily be rested on a showing of discrimination against all the shippers in a large geographic unit, regardless of whether there is discrimination against the unit *qua* unit. The statute is constantly employed by the Interstate Commerce Commission to prevent discrimination between "sections" and "regions," without reference to the geographic scope of "locality." *Consolidated Stone Cases*, 200 I. C. C. 65 (1934); *Consolidated Southwestern Cases*, 218 I. C. C. 11 (1936), 123 I. C. C. 203 (1927); *Cotton, Woolen and Knitting Factory Products*, 211 I. C. C. 692 (1935); *Cotton From and To Points in the Southwest and Memphis*, 208 I. C. C. 677 (1935).

[9] It should be noted that, immediately following the *Texas & Pacific case, supra*, which held that "localities" did not include ports, Congress promptly amended the statute, so as expressly to include ports. Act of August 12, 1935, c. 509, 49 Stat. 607.

than and within the state. In *State* v. *Fremont, E. & M. V. R. R. Co., supra,* where such a state statute was involved, the court said (35 N. W. 118, at p. 125):

> There can be no restriction of the word "locality." It may refer to a village, city, county, or portion of the state, the meaning in each case to be determined by the territory which the board shall find to be unjustly discriminated against.

The word in question is also used in Section 1 of the Cattle Contagious Diseases Act of Feb. 2, 1903 (c. 349, 32 Stat. 791; 21 U. S. C. § 121), and in Section 7 of the Plant Quarantine Act of Aug. 20, 1912 (c. 308, 37 Stat. 317; 7 U. S. C. § 160). In both cases it is clear that Congress intended "locality" to mean a geographic unit of any size necessary under particular circumstances. For instance, Section 7 of the Plant Quarantine Act provides[*] that whenever the Secretary of Agriculture, in order to prevent the introduction into the United States of plant diseases not theretofore widely prevalent within the United States, determines

> that it is necessary to forbid the importation into the United States of any * * * class of plants * * * from a country or locality where such disease * * * exists, he shall promulgate such determina-

[*] Note also the use of the word in the title of the succeeding section of the Plant Quarantine Act (7 U. S. C., § 161).

> tion, specifying the country and locality and the class of * * * plants * * * which, in his opinion, should be excluded. * * * Following the promulgation of such determination * * * the importation of * * * plants * * * specified in the said promulgation from the country and locality therein named, * * * is hereby prohibited; * * *.

Under this section, the Secretary of Agriculture may exclude plants from a "country" or from a "locality." Thus, Quarantine No. 41, issued by the Secretary of Agriculture on April 23, 1926, as revised and supplemented by rules and regulations issued by the Secretary of Agriculture on February 10, 1933, in effect prohibits the importation of corn on the cob from the provinces of Canada east of the eastern boundary of the Province of Manitoba. Regardless of whether residents of St. John, Nova Scotia, regard themselves as "neighbors" of the residents of Baffin Land, or of Windsor, Ontario, and although there are doubtless but few local centers of corn production in this vast region,[91] embracing several times the area of the "locality" here attacked, it seems wholly clear that the determination restricting importation from this area would not be regarded as an arbitrary and capricious application of the word "locality" in view of the Congressional purpose evidenced in the Plant Quarantine Act.

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[91] *Cf.* the prevailing opinion below (R. 390-91).

If any rule of statutory construction were settled beyond dispute, we should have supposed it to be that which gave to the terms of common speech a scope which varies according to their context and purpose. *Towne* v. *Eisner*, 245 U. S. 418, 425; *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491, 494; *People of Porto Rico* v. *Rosaly*, 227 U. S. 270, 275. Particular words are not used, as a mason uses building stone, to fill precisely a premeasured need. Instead, taken alone, most words can do no more than to suggest the general direction of the author's thought. In its context, the word is refined to a more exact content. A workable precision can often, or even ordinarily, be found only when the verbal context is placed against the historical context of the occasion for and the purpose of the language used. This process is the heart of statutory construction, and we should have thought that not since the rules were formulated (*Heydon's Case*, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638), would a court attempt to solve the problems of the wages to be paid by government contractors through reference to the terminology of surgery, sports, motion pictures, and the like.

2. The purposes and legislative history of the Public Contracts Act show that a restriction of "locality" to a "community" or other small geographic unit was not intended by Congress and would defeat the objectives of the Act

The court below found support for its construction of "locality" in certain statements in the

House of Representatives made by Congressmen (not in charge of the bill) during the debates on the measure. It said (R. 394–95):

> To permit the Secretary to establish a minimum wage scale for the area embraced within fourteen States and the District of Columbia would be to defeat rather than to accomplish the purpose of the Act. Under the circumstances it is not necessary to look farther to discover the legislative intent. But if there were any element of vagueness or uncertainty in the language used, either as to the purpose of the Act in using the word locality or as to the intent of Congress that the Secretary of Labor should not be empowered thereby to fix wages, it would be eliminated immediately by reference to explanations given on the floor of the House by those in charge of the measure.

The respondents advance the same contention (Br. in Opp. pp. 23–24). In fact, while the court below is correct in saying that Congress did not intend to empower the Secretary of Labor to "fix" wages, such an analysis of the purpose of the Act is wholly misleading and superficial as applied to this case. Furthermore, the "explanations given on the floor of the House" are in part irrelevant and in part incorrect and incompetent for present purposes,[92] and other highly relevant and significant

[92] With one exception, the extracts from the Congressional Record cited by the court below were not made by Congressman Healey, who was in charge of the bill. The one state-

phases of the legislative history were entirely overlooked.

(a) The objectives of the Public Contracts Act

The Walsh-Healey Act or Public Contracts Act,[93] as finally enacted on June 20, 1936, and approved June 30, 1936, was the immediate product of an effort initiated in Congress within a month after the decision in *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, to exert the purchasing power of the United States Government to preserve the advanced labor standards[94]

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ment quoted from Congressman Healey's remarks is totally irrelevant. Under well-settled principles, the other statements are of no weight in judicially construing particular language in the statute. *Infra*, pp. 123, 124.

[93] The Walsh bill (S. 3055, 74th Cong., 1st Sess.) was introduced in the Senate on June 14, 1935, and, as amended, passed the Senate on August 12, 1935. This bill was referred to the Committee on the Judiciary of the House of Representatives. This committee studied the bill during the recess of Congress and at the beginning of the second session a new bill, the Healey bill (H. R. 11554, 74th Cong., 2d Sess.), was introduced. Hearings were held by a subcommittee of the Committee on the Judiciary, of which Representative Healey was chairman, on the Healey bill which was eventually tabled, and S. 3055 was amended by the substitution of a new draft differing from both the Walsh and Healey bills. As thus amended, S. 3055 passed the House of Representatives after general debate on June 18, 1936, and the amendment was accepted by the Senate without debate on June 20, 1936.

[94] As early as 1892 Congress adopted the policy of controlling the award of Government business in such a manner as to encourage the maintenance of high labor standards. The Act of August 1, 1892, c. 352, § 1, 27 Stat. 340,

which had been achieved under the National Industrial Recovery Act.[95] Concern in Congress was felt not only for the welfare of labor as such, but also because extensive reduction of wages[96] meant reduced consumer purchasing power, restricted demand for the products of industry, and a further spread of unemployment.[97]

In addition to the desire to support and stimulate the national economy by maintaining wage scales, consumer purchasing power, and general standards of living, Congress sought to remove the United

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40 U. S. C. sec. 321, established the eight-hour day for laborers and mechanics employed on public works of the United States or the District of Columbia. In 1912 this policy was extended beyond the construction industries into the broader field of industries whose products the Government purchases. Act of June 19, 1912, c. 174, § 1, 37 Stat. 137, 40 U. S. C. sec. 324. Cong. Rec. Vol. 48, Part 1, p. 388; Sen. Rep. 601, 62d Cong. 2d sess., Cong. Rec. Vol. 48, Part 6, p. 6108.

[95] The first attempt to control the award of Government contracts generally in such a manner as to support fair minimum wage standards occurred under the authority of Executive Order No. 6646, issued by the President on March 14, 1934, under authority of Title I of the National Industrial Recovery Act, Act of June 16, 1933, c. 90, 48 Stat. 195.

[96] Studies made by the Government Contracts Division of the National Recovery Administration in 3507 firms engaged in performing various types of contracts with the federal government revealed that between September and December 1935, 1480 or 42.20% of the firms investigated had reduced wages and 1309 or 37% had increased hours. Hearing before a Subcommittee of the House Committee on the Judiciary, 74th Cong., 2d Sess., on H. R. 11554, Serial 12, Part 2, pp. 131–153.

[97] See Appendix C, *infra*, pp. 20–28.

States Government from the position of encouraging sweatshop and substandard wage conditions by awarding contracts to manufacturers who, by paying excessively low wages to their employees, were in a position to underbid their higher wage-paying competitors. This is clearly shown by the extracts from the Congressional Record, and from the hearings on the Walsh and Healey bills printed in Appendix C, pp. 20–56.

Closely connected with the sweatshop and substandard wage problems is the tendency of individual plants or even of entire industries to migrate into low-wage areas. Throughout the hearings and debates on the Public Contracts Act, concern was expressed for the social consequences of such industrial migration.[98] As a result of such migration, whole communities may be stranded without source of livelihood, and the very threat of migration operates to depress existing wage levels down toward the level of the lowest wage competitors.

Although the phenomenon of "runaway" shops had been a blight upon industry in various parts of the country, it had been felt especially keenly in Massachusetts, the home State of both Senator Walsh and Representative Healey, the authors of the Public Contracts Act. The nature and causes of the migration of industrial establishments had been the subject of several official investigations in Massachusetts and had become matters of common

[98] See Appendix C, pp. 20–56.

knowledge. One of the early studies of runaway plants in Massachusetts was conducted by the Governor's Committee on the Shoe Industry.[99] In its report, the Committee observed the ease with which shoe factories might be moved to avoid minimum wages set for small areas. The N. R. A. Shoe Code had provided different wage minima for towns of varying size. Within a few months, there was a widespread shifting of shoe factories to outlying towns in Massachusetts and in other states.[1] The Committee reported also (pp. 4–5) the testimony of the Secretary of the Brockton Shoe Manufacturers' Association in explanation of the particular circumstances which made the sudden migration of shoe factories possible.[2] That this

[99] Mass., Governor's Committee on Shoe Industry, Gleason L. Archer, Chairman, Report, Apr. 11, 1935.

[1] The Committee's Report (p. 2) listed 21 migrations, involving about 3,300 employees, from the single town of Lynn, Massachusetts, during the period from August 1, 1933, to January 1, 1935.

[2] "A shoe manufacturer * * * who can convince the United Shoe Machinery Company, which controls about 95 percent of all shoe machinery now operating in the United States, that he is a responsible individual and has a reasonable amount of financial backing, may secure machinery for a factory without being obliged to purchase the same * * *."

"A clever system of royalties on every shoe manufactured in a factory thus equipped brings to the United Shoe Machinery Company the same royalty return irrespective of State or Nation in which the factory is located. There is, therefore, no reason why the Company should play favorites with any locality. Thus, whether a manufacturer sets up in Lynn, Massachusetts, or Skowhegan, Maine, it is all the

situation is still characteristic not only of this but of other industries has been established by numerous other observers.[3]

The "runaway shop" evil is by no means confined to the shoe industry. A Massachusetts legislative commission recently made a general report[4] on industrial migrations from Massachusetts and

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same to the Company. He will be supplied with machinery. Thus it is that the lease system has placed the shoe industry 'on roller skates' as it were, making it possible for manufacturers to move from place to place, or to get up in new localities, without the necessity of heavy investments."

[3] Carson, W. J. (ed.), *The Coming of Industry to the South*, 1931, January 1931 issue, Annals of the American Academy of Political and Social Science; Creamer, D. B., *Is Industry Decentralizing?* 1935, Bulletin III, University of Pennsylvania Press; C. Goodrich, and others, *Migration and Economic Opportunity*, 1936, University of Pennsylvania Press; Hoover, E. M., *Location Theory and the Shoe and Leather Industries*, 1937, Harvard University Press; Schumacher, H.; *Location of Industry*, Volume IX, Encyclopedia of the Social Sciences, 1933, Macmillan; U. S. Department of Labor, Bureau of Labor Statistics, *Productivity of Labor in the Cotton Garment Industry*, 1938, Bulletin No. 662; U. S. National Recovery Administration, Division of Review, *Migration of Selected Industries as Influenced by Area Wage Differentials in the Codes of Fair Competition*, 1936, Work Materials No. 45. A bibliography prepared by the U. S. Bureau of Foreign and Domestic Commerce on the Location of Factories, 1938, lists numerous periodical articles on the subject of industrial migration to low wage areas.

[4] Final Report of the Commission on Interstate Cooperation to the General Court [Massachusetts] Concerning the Migration of Industrial Establishments From Massachusetts, under Chapter 10, Resolves of 1938, House No. 2495, June 1939, pp. 16–18.

noted during the period from 1930 to 1938 the migration of 79 boot and shoe factories into New Hampshire, Maine, Rhode Island, New York, Pennsylvania, and Indiana; 15 boot and shoe cut stock and findings establishments into New Hampshire, Maine, Rhode Island, and New York; 7 tanned, cured, and finished leather manufacturing plants into Maine, New Hampshire, and Delaware; 11 foundries and machine shops into Maine, Rhode Island, Pennsylvania, New Jersey, and New York, and 3 to midwestern states; 4 electrical machinery establishments employing 735 workers; 3 textile machinery plants into Maine and southern states; 3 rubber goods factories into Rhode Island, Connecticut, and Indiana; 12 men's and women's clothing establishments into New York, Rhode Island, Maine, Connecticut, New Jersey, Pennsylvania, and Virginia.

It thus appears that the general objectives of the Public Contracts Act were (a) to exert the purchasing power of the federal government so as to foster a sound national economy by maintaining consumer purchasing power and preventing unemployment and industrial dislocation, and (b) to remove the Government from the position of encouraging and abetting sweatshop and substandard wage conditions. In particular, Congress sought to remove the competitive advantages enjoyed in bidding for Government contracts by firms which paid sweatshop or substandard wages, and thereby

to lend the weight of the Government as a customer to the maintenance of wage levels, and to check in some measure industrial migration to low-wage areas.

(*b*) *The legislative development of the prevailing minimum wage standard*

The formulation of the wage standard in the Public Contracts Act is of particular importance in view of the reliance placed by the Court of Appeals and by respondents upon the similarity of the Public Contracts Act to the Davis-Bacon Act. The original bill (S. 3055, 74th Cong., 1st Session) introduced by Senator Walsh, as amended and passed by the Senate, provided that the minimum wage standard should be "fair and reasonable" and based on such factors as the cost of living, the standards for the same class of labor in the same locality, and the standards prescribed by the N. R. A. codes of fair competition. A similar proposal for a wage founded on standards of fairness and reasonable value was embodied in the revised [5] House measure known as the Healey bill (H. R. 11554, 74th Cong., 2d Session).

This wage standard encountered immediate opposition in the subcommittee of the Committee on the Judiciary to which the bill was referred, the contention being made that it conferred upon the Secretary of Labor unlimited discretion to "fix" wages and hours for all industries.[6] Because of

[5] *Supra*, p. 106, n. 93.

objections that the bill authorized the setting of wage and hour standards higher than those anywhere existing, the Committee amended both the wage and hour standards to limit the scope of administrative discretion. In lieu of the highly discretionary wage standard based on fairness and reasonableness, which could conceivably have permitted the establishment of wages not paid anywhere in industry, the Committee amended the bill so as to provide for payment of the "prevailing minimum wage."

There is no doubt that the prevailing minimum wage standard embodied in Section 1 (b) of the Act in its final form was adapted from the familiar prevailing wage standard of the Davis-Bacon Act,

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[6] The following extract from the hearings on H. R. 11554 (S. 3055), Part 2, page 129 is revealing:

"Mr. MICHENER. As a matter of fact, this bill as drawn, would give to the Secretary of Labor the right to fix hours and wages of most industry in the country, would it not?

"Mr. REILLY. As the bill now stands, it could confer that right only with respect to industries which receive a Government contract and only with respect to the labor actually engaged in the subject matter of the Government contract.

"Mr. MICHENER. Yes; but the bill is so artfully drawn, as a matter of fact, that one could hardly think of a line of endeavor where you would not have to have either the standard of hours and wages, as fixed by the Secretary, or two standards operating in the country at the same time; one which industry fixed and the other which the Secretary fixed.

"In other words, the real purpose back of the bill is to permit the Secretary of Labor to fix the hours and wages throughout the country eventually?"

and proponents of the measure sought to allay the opposition to the standards contained in the earlier drafts by pointing out that this standard was borrowed from the Davis-Bacon Act, that it was not based upon the N. R. A. codes, as was S. 3055, nor did it permit the "wage-fixing" contemplated by H. R. 11554.[7]

But Congress carefully avoided adoption of the entire statutory scheme and "wage-language" of the Davis-Bacon Act. The scheme of the Davis-Bacon Act was designed for application to the construction industry where crafts are well defined. The "prevailing" standard employed by that Act was not a "minimum" wage standard. But craft

[7] Extracts from Cong. Rec., Vol. 80, part 9:

"Mr. HEALEY. * * *

"* * * We have had a great deal of talk about this bill being a small N. R. A. bill for Government contracts. This is absolutely not the truth. This bill does not set the standard for minimum wages by reference to the codes that obtained under N. R. A., but definitely sets it as the prevailing minimum wage for similar work or in the industries operating in the locality in which the contract is to be performed" [at page 10002].

"Mr. WALTER. * * * If there is any grave differences of opinion with respect to any portion of this bill it certainly comes with respect to the possibility, if you please, of the Secretary of Labor fixing wages. There is no Member of this House any more opposed to that idea than I am. I say to you frankly that I would not have voted to report such a bill, but there is nothing in this measure that gives to anyone in any executive branch any authority to fix wages. We have had no difficulty in determining what the prevailing rates of wages are under the Bacon-Davis Act" [at page 10004].

lines are not so well defined in the mass production industries from which supplies and equipment are purchased. Instead of the "prevailing" wage standard of the Davis-Bacon Act, Congress provided a "prevailing *minimum*" wage standard in the Public Contracts Act and instead of determining the prevailing standard for each craft, i. e., "the corresponding classes of laborers and mechanics employed on projects of a character similar * * *," the prevailing minimum wage standard is to be determined with reference to "similar work or in the particular or similar industries or groups of industries * * *."

Furthermore, and of the greatest significance, Congress carefully avoided carrying forward into the Public Contracts Act the Davis-Bacon geographic unit—

> city, town, village, or other civil subdivision of the State in which the work is to be performed.

Instead it selected the phrase "locality in which the materials * * * are to be manufactured or furnished * * *" as the geographic unit within which the mathematical fact of prevalence is to be determined.

(c) *The necessary meaning of "locality in which the materials * * * are to be manufactured" in the light of the purposes and legislative history of the Public Contracts Act*

The foregoing recital of the background and purposes of the Public Contracts Act makes it clear

that, while the statute carries out the same general policy which the Davis-Bacon Act sought to further, the more recent statute is an extension of the general policy into a new field and subject matter—supply contracts rather than construction contracts. It must be assumed that Congress intended the provisions of the Public Contracts Act to be suitable and appropriate in this new field. Consequently, if a more flexible and variable geographic unit for wage determinations is necessary in order that the general policy may be carried out in the new field, the language should be construed so as to authorize the designation of "localities" of any dimensions appropriate under particular circumstances in the administration of the Act. And, as we will now show, such flexible units *are* necessary in the field of supply contracts.

While the Public Contracts Act is an application of the same policy which underlies legislation of the Davis-Bacon type, the crucial differences in the means appropriate to the application of that general policy arise from the completely different characteristics of construction contracts and supply contracts and the completely different character of some of the *specific* evils (as distinguished from the *general* evil of substandard wages) sought to be dealt with by the two types of legislation.

There is but one possible place of performance of a construction contract. Such a contract must be performed at the site selected in advance of the award of the contract. For this reason, the place

where the work is to be performed on such a contract is ascertainable with precision. And since wage rates prevailing at the site can only be threatened by the competition of cheaper labor engaged at the site of construction, the wage rates prevailing at the one possible place of performance can be protected and the practices which threaten those rates can be suppressed by requiring all bidders, wherever situated, to conform to the standard prevailing at the one possible place of performance.[8]

Since there are as many possible places of performance of a supply contract as there are different bidders for the contract, in advance of the award of such a contract the "locality in which the materials * * * are to be manufactured * * *" is *prima facie* as broad as the area within which all of the possible bidders are located. And the protection of wages in the area or locality within which a supply contract is to be performed requires a uniform wage standard throughout the geographical area within which low wages could otherwise operate to confer decisive competitive advantage on the low-wage bidder. Reference to some of the more flagrant industrial practices which were encouraged by the unrestricted operation of the low-bidder statute, R. S. § 3709, and which Congress

[8] The simple pattern of practices which Congress sought to suppress by the Bacon-Davis Act is shown by the extracts from the Congressional debates printed in Appendix D. *infra*, pp. 57–64.

sought to suppress in the competition for government supply contracts, has already been made.[9] The most cursory examination of the sweatshop evil will demonstrate the impossibility of combating it by the establishment of a separate prevailing wage standard for each of the numerous "communities" or "local centers of manufacture" in which the plants of a particular industry are located. Sweatshop or substandard wage plants are frequently located in isolated, rural centers far from the plants of competitors. The determination of the prevailing minimum wage for each local center of manufacture would merely place the stamp of approval on sweatshop rates and would not only perpetuate them in the plants where they exist but would encourage their spread to competing firms.[10] Such a procedure would frustrate the objectives of this Act just as the objectives of the Davis-Bacon

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[9] *Supra*, pp. 106-112.

[10] Respondents have argued (Br. in Opp. p. 29) that the inclusion in Section 1 (b) of the alternative bases of "similar work" and "similar industries or groups of industries" in addition to the "particular industry" are meaningless except when viewed as alternatives to be ultilized when there is but a single plant of a particular industry in a small local center of manufacture, and that these alternatives must therefore have been included *because* locality denotes an intrinsically small area. But it seems clear that these alternative bases were included to enable the Secretary of Labor to meet the situation in which an entire industry or an extensive portion of an entire industry is affected with sweatshop wage conditions. In such situations the "particular industry" standard of minimum wages is inappropriate to the accomplishment of the Congressional purpose.

Act would be frustrated by requiring each bidder on a construction contract to pay, instead of the wages prevailing where the contract is to be performed, whatever wages prevailed in the community in which the bidder's principal office is located.

Likewise, the facts concerning the "runaway shop" evil are sufficient to indicate that the establishment of a separate prevailing wage for each center of manufacture would merely operate to encourage migration to a lower wage center of manufacture. Effective elimination of the competitive advantages of this practice can only be accomplished by making it unprofitable for industry to migrate solely for the purpose of achieving low wage costs.

The precise boundaries of the area within which it is possible to say that a particular supply contract is to be performed will depend upon the peculiar facts of each industry. Certain industries, such as the linoleum industry, are composed of very few manufacturing plants and it is conceivable that an isolated plant might not compete with others and might, therefore, constitute the sole plant within a locality in which materials are to be manufactured under certain contracts.[11] In other industries, transportation costs may be so great a fraction of the delivered cost as greatly to restrict

[11] In the linoleum industry, there are only four producing plants, one in Lancaster, Pa., one in Kearny, N. J., one in Trenton, N. J., and one in Emeryville, California. See U. S.

the competitive radius of any one plant or cluster of plants.

Other industries present characteristics of geographic diffusion as striking as the concentration in the linoleum industry. The 2,193 mills of the Flour and Grain Products Industry [12] are distributed throughout every state of the Union and one or more plants is to be found in 1,129 of the 2,053 counties in the country.[13]

Thus, the industries for which the Secretary must make minimum wage determinations range from those which are extremely concentrated to

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Bureau of the Census, Biennial Census of Manufactures, 1935, p. 240. No study of the linoleum industry has been made for the determination of minimum wages under the Public Contracts Act, but it is probable, as to any contract to supply linoleum to Government offices in the far west, that the contract will be performed in Emeryville, California. But even so, it is not certain that a determination of prevailing wages in the linoleum industry for a locality consisting of the city of Emeryville alone would fully accomplish the purposes of the Act. Such a determination might merely operate to encourage migration of the Emeryville linoleum plant to some other place for which no prevailing wage had been determined. In the light of this factor, therefore, it might be proper to determine the prevailing minimum wage for a larger area. In any case, the facts of the linoleum industry suggest the type of industrial facts which may, in proper cases, provide the basis for a determination that the materials called for by certain contracts "are to be manufactured" within a very small area.

[12] U. S. Bureau of the Census, Biennial Census of Manufacturers, 1935, p. 135.

[13] U. S. Department of Commerce "Industrial Market Data Handbook of the U. S." Domestic Commerce Series, No. 107, 1939, pp. 134–815.

those which are spread throughout the nation. By virtue of this, the Secretary's determination of the "locality in which the materials * * * are to be manufactured" must range from the extremely small communities, which the court below envisaged, to the entire nation. But, even in cases where manufacturers are diffused throughout the nation, it does not follow that the locality determined by the Secretary must be the entire nation. Transportation costs may limit the effective marketing area. Other economic characteristics may reveal fairly well-defined competitive areas within the industry, and that contracts for delivery in one area will probably be confined to bidders whose plants are situated in that area, while competition for the delivery to another part of the country will be confined to bidders situated in another (and perhaps partially overlapping) area.

The variety of industrial situations to which the statutory scheme must accommodate itself sufficiently indicates that it is not only impossible in most cases to determine the local center of manufacture in which a particular supply contract will be performed, but that the determination of a separate minimum wage standard for each local center of manufacture would foster rather than suppress the very practices which Congress sought to discourage, and defeat the objectives of the statute.

The court below wholly failed to take account of the competitive areas involved in Government sup-

ply contracts. It recognized that the deliberate substitution of "locality" (in the Public Contracts Act) for the "municipal subdivision" unit (in the Davis-Bacon Act) was not without significance. But the court did not comprehend the significance which it noted.[14] As we have shown, the significance is found in the inherent difference between construction contracts which are let with a single fixed site in contemplation, and supply contracts, the site of the performance of which cannot be ascertained in advance, and in the consequences which flow from that inherent difference. Because of its failure to appreciate the purposes sought to be achieved by the Act and the character of the evils which were sought to be suppressed, the court below relied upon certain remarks[15] made in the general

[14] The court thought the change was purely for the purpose of allowing the unit to overlap municipal boundaries (R. 392–93). But such overlap might be just as necessary under the Davis-Bacon Act.

[15] A footnote to the opinion shows that reference was made to the following language (Congressional Record, Vol. 80, Part 9, 74th Cong., 2d Sess.):

"Mr. GREENWOOD. Mr. Speaker, this resolution from the Committee on Rules provides for consideration of what is known as the Walsh-Healey bill, which bill regulates specifications in connection with the purchase of supplies by the Government of the United States. It provides that no less than the prevailing minimum wage shall be paid to workers in the community where the supplies are manufactured or where the work is performed" [at p. 9992].

"Mr. GREENWOOD. This bill provides that they shall pay the prevailing wages in the community where the work is

debate in the House of Representatives which were thought to show that Congress specifically intended that the Secretary of Labor should determine different minimum wage standards for each "community" or "local center of manufacture" (R. 394).

It should be noted that the Court below departed from well established principles of statutory construction in its treatment of the debate. It is ap-

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performed; so the bill takes care of the very proposition of which the gentleman speaks" [at page 9993].

"Mr. CITRON. The bill before us is in substance an extension of the Bacon-Davis Act to all Government purchases amounting to over $10,000 * * *. The bill merely provides that the Government shall have the right to refuse the bids on all purchases over $10,000 to those * * * (4) who pay less than the prevailing rate of wages in their community" [at page 10008].

"Mr. HEALEY. That is an administrative problem. As I view it, the prevailing wage is already a fact which already exists. The Secretary's duty is simply to inquire and ascertain what that prevailing wage is" [at page 10003].

"Mr. WALTER. If there is any grave differences of opinion with respect to any portion of this bill it certainly comes with respect to the possibility, if you please, of the Secretary of Labor fixing wages. There is no Member of this House any more opposed to that idea than I am. I say to you frankly that I would not have voted to report such a bill, but there is nothing in this measure that gives to anyone in any executive branch any authority to fix wages. We have had no difficulty in determining what the prevailing rates of wages are under the Bacon-Davis Act. It has been a comparatively simple matter to go into each community in which Government buildings are being constructed, and determine what every particular artisan is paid in that community. The problem is the same here" [at page 10004].

parent that the court actually relied upon the statements of Representatives Greenwood, Citron, and Walter to show the interpretation which Congress intended to be placed on the word "locality." For this purpose, the general debate may not be relied upon. *Wright* v. *Vinton Branch,* 300 U. S. 440, 464; *Humphrey's Executor* v. *United States,* 295 U. S. 602, 605; *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 651. Only the sponsor (*Richbourg Motor Co.* v. *United States,* 281 U. S. 528, 536, referring to Cong. Record, Vol. 58, Part 3, p. 2902) and the person in charge of the bill on the floor (*Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 474–5) are competent to make authoritative statements with reference to the meaning of particular words. The statements of an ordinary member of the committee which reported the bill are not evidence of the meaning of the language. *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 493–4 (referring to Cong. Record, Vol. 61, Part 7, p. 7071–5).

The only member of the House of Representatives whose remarks are competent to show the meaning of the particular word *locality* was Representative Healey, whose name the bill bore and who was in charge of the measure on the floor. But his remarks lend no support to the view that Congress specifically intended to confine the locality unit to small areas such as metropolitan centers. He refers to "industries operating in the locality"

(Cong. Rec., Vol. 80, Part 9, p. 10002), and to a specific question as to how prevailing minimum wages in a specific town in Iowa would be determined, he replied: "The prevailing wage will be determined for the general locality." *Id.*, p. 10023.

As for the particular remarks upon which the court below erroneously relied in construing "locality," there would be no reason, even if the remarks were a valid source for determining Congress' intent in employing that word, to give them any substantial weight. Representative Greenwood's remarks were made as a member of the Rules Committee, in presenting the resolution calling up S. 3055, which he attempted to describe, but described inaccurately. From the comments of Representatives Citron and Walter, both members of the Judiciary Committee, the court below drew an erroneous inference. It is perfectly clear that these comments were merely intended to make clear that the revised bill, like the familiar Davis-Bacon Act, embodied a *prevailing* wage standard, rather than the highly controversial and discretionary standard of the original bill which authorized minimum wages fairly commensurate with the value of the services rendered.[16]

[16] This controversy was fresh in the minds of the committeemen since it had occupied the attention of the members since the hearing of the bill on March 23 up until June 5, 1936, when the bill was reported. Not until the proponents had agreed to amend the bill in this respect had

Furthermore, if precedent is to be broken in this case by looking to the general debates for light on the intended meaning of a particular word, the most significant remarks were overlooked by the court below and are ignored by the respondents. The most considered references to "locality" were made by an opponent of the bill, Representative Michener, also a member of the Judiciary Committee, who carefully pointed out during the debate that, in adopting "locality" as the geographic unit, an important departure had been made from the Davis-Bacon Act, and who opposed the necessarily far broader discretion in determining the unit which was thereby conferred upon the Secretary of Labor.[17] The sponsors of the bill did not dispute Representative Michener's analysis.

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they been able to muster a sufficient majority in the full committee to secure favorable action on the proposed legislation. It is apparent, moreover, that the analogy drawn by Representative Citron to the Davis-Bacon Act, which was quoted by the court, sheds no light on the meaning of "locality" since immediately after the words quoted, he went on to say:

"I frankly confess that I am worried about the textile industry of my State. I am worried because firms are moving to foreign fields, like Canada, or to other sections where they can take advantage of low-standard wages" (id. 10009).

It is obvious that the maintenance of the wages prevailing in the communities in which these textile firms are located could not be achieved by limiting the area within which a uniform standard of wages is applied to these communities themselves. Such a limitation would merely stimulate migration to lower wage centers.

[17] 80 Cong. Rec., pt. 9 (74th Cong., 2d Sess.), p. 10006:

"* * * It permits the Secretary of Labor, Mme. Per

The foregoing analysis of the legislative history also disposes of respondents' contention that the Act gave the Secretary "no authority to fix wages." If this argument means simply that the Act confers no power to raise wages generally, the Government readily concedes the point. Comment has already been made on the fact that Congress adopted the standard of ascertainable "prevailing" wages in lieu of a standard based on fairness or reasonableness. If respondents really mean, however, that the Act left the Secretary of Labor powerless to do anything else than to freeze the *status quo*, the

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kins, to determine what the prevailing minimum wages are in the locality in which the materials are to be manufactured or furnished. No formula is set up to be followed by the Secretary of Labor. It is fair to presume, therefore, that she will take into consideration such factors as she thinks advisable. There is no definition of the word 'locality,' although the committee spent much time on this word, because this is most important. If some of the proponents of this bill had their way, there would be a uniform wage for uniform factory work all over the United States. Others suggested that the country might be divided into zones and zone minimum wage rates be set up; while others suggested various political subdivisions as the locality.

"The Bacon-Davis Act deals with the construction of public buildings or works only. The prevailing wage in the community must be paid. Where there is a labor organization in the community, the wage fixed by that organization has been accepted by the Secretary of Labor as the prevailing wage. However, the task is not difficult, because the territory is limited to the town, city, or village where the construction is to take place. And it seems to me that this bill should at least contain further limitations, and not leave the entire United States as the locality—limited only by the discretion of the administering officer."

contention clearly cannot be supported, since the determination of a prevailing rate for *any* locality containing wage differentials would cause bidders who did not conform to it either to raise wages to that level or to remain out of the Government contracts market. Since it is conceded that if the boundaries of the localities in the steel determination were properly drawn, the rates determined were indeed the minimum rates prevailing within such localities, the constant reference to the "fixing" of wages confuses rather than clarifies the issue. Particularly is this the case since the Congressional references to wage fixing were made with reference to the difference between the standard provided by the original bill and the revised bill, rather than with reference to the geographical units within which the standard was to be applied.

3. Administrative construction of the Public Contracts Act supports the view that "localities" are not limited to "communities" or other small geographic unit

In the course of two and one-half years of administration of the Public Contracts Act, the Secretary of Labor had issued 22 prevailing minimum wage determinations prior to the issuance of the determination attacked in this case.[18] In none of

[18] Determinations had been made for the following industries prior to that for Iron and Steel: Men's Work Clothing, 2 Fed. Reg. 233; Cotton Garment, 2 Fed. Reg. 1333; Men's Hat & Cap, 2 Fed. Reg. 1335, 3 Fed. Reg. 224; Men's Neckwear, 2 Fed. Reg. 1336; Men's Underwear, 2 Fed. Reg.

these instances had the Act been construed in such a way as to require the application of the prevailing wage standard within small "local centers of manufacture," or "community" units. The approach to the problem of selecting the unit or units within which the application of the uniform prevailing wage standard would most effectively accomplish the legislative objectives of Congress was made in the light of the particular characteristics of each industry. "Localities" as large as or larger than those designated in the present case were commonly designated; in only one (Granite) was a smaller "locality" determined. These determinations affected a wide variety of industries and, as the determination here challenged itself suggested (R. 245), it is reasonable to suppose that if this construction of the Act was repugnant to the Congressional purpose, as the court below suggests it to be, Congress would have acted to alter the construction. *Armstrong Co.* v. *Nu-Enamel Corp.*, 305

1337; Men's Raincoats, 2 Fed. Reg. 1336, 4 Fed. Reg. 4005; Seamless Hosiery, 2 Fed. Reg. 1338; Work Glove, 2 Fed. Reg. 1339; Men's Welt Shoe, 2 Fed. Reg. 2960; Dimension Granite, 2 Fed. Reg. 2976; Handkerchief, 3 Fed. Reg. 64; Barrack Bags & Bandoleers, 3 Fed. Reg. 257; Envelope, 3 Fed. Reg. 889, 1613; Leather & Sheep-lined Jackets, 3 Fed. Reg. 895; Wool & Wool-lined Jackets, 3 Fed. Reg. 896; Vitreous or Vitrified China, 3 Fed. Reg. 901; Flint Glass, 3 Fed. Reg. 1612; Luggage & Saddlery, 3 Fed. Reg. 1153; Wool Carpet & Rug, 3 Fed. Reg. 2371; Fireworks, 3 Fed. Reg. 2370; Tag, 3 Fed. Reg. 2537; Aircraft, 3 Fed. Reg. 3043.

U. S. 315, 330; *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96; *United States* v. *Shreveport Grain & El. Co.* 287 U. S. 77, 84; *Wisconsin* v. *Illinois*, 278 U. S. 367, 413; *Swendig* v. *Washington Co.*, 265 U. S. 322, 331.

Respondents characterize as disingenuous (Br. in Opp. pp. 11–12) the statements in the Determination that a "narrowly restricted construction of the word "locality" as used in the Act is contrary to the administrative construction consistently adhered to by the Secretary of Labor in the administration of the Act" and that "Reference to the determinations heretofore made in the administration of the Act will disclose a consistent approach to the problem of selection of appropriate units for prevailing minimum wage determinations in the light of the facts of each particular industry" (R. 245). The disingenuity said by respondents to have been "exploded" by the court below is supposed to arise because of the fact that the first determination made under the Act,[18a] that of January 30, 1937, relied upon a legal opinion to the effect that the word "locality" was not intended to designate the unit within which prevailing minimum wages are required to be paid when applied to the "particular or similar industries," and that the word is only intended to designate the unit to be observed when prevailing minimum wages are being determined for "groups of industries."

[18a] Decision of the Secretary of Labor in the Matter of Determination of Prevailing Minimum Wages in the Men's

We do not urge that the Secretary has adopted a consistent legal interpretation of the particular words found in Section 1 (b). That Section, not drawn with notable clarity, is susceptible of both the interpretation adopted in the Men's Work Clothing Determination and that adopted in the present Determination. The important fact to be noted is that under either reading of Section 1 (b) the statute has been construed to permit the division of the country into reasonably broad groupings of plants located in the competitive areas relevant to bidding upon Government contracts. Thus, in the Men's Work Clothing Determination itself, as with certain other industries, the prevailing minimum wage was determined for the entire country. This broad interpretation, as we have shown, is essential if the purposes of the Act are to be accomplished. It is apparent that the more recent interpretation of the Secretary better comports with the statutory language. But the essential thing is that, under either theory, the actual determinations have been wholly consistent, and have uniformly made the areas for which prevailing minimum wages were determined broad enough to accomplish the statutory purpose.

Consequently, it is submitted that the court below was grossly in error in regarding (R. 393–94) the construction which we here urge as having been first adopted forty days prior to the commencement of this suit.

4. Considerations of administrative feasibility likewise show that "locality" is not restricted to small geographic units such as "communities"

That Congress did not intend to require the use of small *local* "centers of manufacture" or "communities" as the geographical unit for application of the prevailing minimum wage standard is also shown by reference to the administrative impracticality of such a procedure. Because of its view that the word "locality" is susceptible of only one limited interpretation, i. e., a very small area synonymous with "place," "vicinity," or "community," the court below disposed of this consideration by stating that questions of administrative convenience and necessity cannot sanction "disregarding the clearly expressed intention of Congress" (R. 393). However, as we have already shown,[19] the word "locality" does not bear any such fixed meaning as the court below supposed. There can, therefore, be no doubt that considerations of the extent to which the various possible constructions of the statutory language will in practice permit administration of the legislation in such a manner as to accomplish rather than frustrate its purposes are relevant aids to construction.[20]

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[19] *Supra*, pp. 93–104.

[20] *Missouri Pacific R. Co.* v. *Holt* (C. C. A. 8), 293 Fed. 155, certiorari denied, 264 U. S. 584; *Red River Broadcasting Co.* v. *Federal Communications Commission* (App. D. C.) 98 F. (2d) 282, 286–287; *Illinois Coal Operators Mutual Employers' Liability Insurance Co.* v. *Chicago, Wilmington and Vermilion Coal Co.*, 217 Ill. App. 625.

The respondents have contended (Br. in Opp. pp. 29–30) that under the Davis-Bacon Act it has proved administratively feasible to make prevailing wage determinations for communities, and that in the iron and steel wage determination here attacked, the Public Contracts Board easily obtained wage data from the iron and steel industry. But these observations do not meet the issue. It is true that the Secretary of Labor has made several thousand determinations of prevailing wages under the Davis-Bacon Act within the cities, towns, and villages in which public construction contracts have been performed. But for the purposes of that Act each contract calls for a determination of the wages prevailing in but *one* city, town, or village. The problem under the Public Contracts Act is quite different. Here it is necessary for the Secretary of Labor to determine the prevailing wages for each of the thousands of local centers of manufacture throughout the country. While this may not present particularly grave problems in geographically concentrated industries such as automobiles, rubber tires, or firearms, or even in industries such as the steel industry, in which the plants are relatively few, it must be remembered that the statutory unit must also accommodate industries in which the plants are numerous and widely diffused. Thus, before the Act could be applied to contracts for the purchase of flour, the Secretary would be required to determine the wages prevailing in the flour industry or simi-

lar industries in each of the local centers of production in which the 2,193 flour mills of the country are located, regardless of the fact that from thousands of these towns no bids whatever might be expected.

When it is remembered that the Public Contracts Act applies not to a single industry, as does the Davis-Bacon Act, but to the whole range of industries whose products are purchased by the Government, the complete dissimilarity of the problems under the two acts becomes apparent. Were the Secretary of Labor required to determine the wages prevailing in each of the many local centers of production in each industry, it would seriously delay the making of wage determinations and postpone for a number of years the full intended effect of the Act. Wage fluctuations would also present an administrative problem.[21] We cannot believe that such a delay would be consistent with the manifestly emergency objective of Congress to control competitive practices affecting wage standards before and not after existing wage structures had been demoralized.

5. Even if this Court disagrees with the construction of "locality" upon which the determination is based, the determination should not be set aside by the courts since the construction is not arbitrary or clearly erroneous.

We believe that we have shown that the Acting Secretary's determination of the *localities* "in which materials * * * are to be manufactured

[21] See Note (1940), 49 Yale L. J. 548, at p. 552.

or furnished * * *" under Government steel supply contracts was based upon a proper construction in the light of the context, purpose, legislative history, and administrative construction of the Public Contracts Act. However, even if this Court should disagree with the construction which we urge, and might come to a different conclusion if the question were presented as an original proposition, that would not be enough to warrant enjoining enforcement of the determination. At the very least, the construction has been shown to be tenable and reasonable, and in no way arbitrary or clearly erroneous.

The courts have consistently ruled that in suits for injunction or mandamus to control the actions of administrative or executive officials, judicial intervention is limited to deciding whether the action was arbitrary, capricious, or palpably erroneous.[22] If the administrative official has been granted authority to construe the terms of the statute delineating his functions or to make rulings of law (as is clearly the case here, since "locality" is not a

[22] *Decatur* v. *Paulding*, 14 Pet. 497, 515; *Gaines* v. *Thompson*, 7 Wall. 347; *Dunlap* v. *Black*, 128 U. S. 40; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683; *Houston* v. *St. Louis Ind. Packing Co.*, 249 U. S. 479, 484-5; *Hall* v. *Payne*, 254 U. S. 343; *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 203–4; *Work* v. *Rives*, 267 U. S. 175; *Miguel* v. *McCarl*, 291 U. S. 442, 451; *Adams* v. *Nagle*, 303 U. S. 532; *Reichelderfer* v. *Johnson*, 72 F. (2d) 552 (App. D. C.); *Brunswick* v. *Elliott*, 103 F. (2d) 746 (App. D. C.).

mathematically precise word like "acre" or "square mile," his decisions, even in legal matters, will not be overturned unless palpably erroneous.[23] It is never enough, the cases hold, that the court differs from the administrative official as to the correctness of his interpretation or the wisdom of the exercise of his discretion; the error must be so plain as to constitute arbitrary action.

Respondents have attempted to evade the application of these settled doctrines by contending that they are significant only in mandamus actions, and by references to superficially similar cases in which the court *seemed* to substitute its own view of the statute for that of the administrative official.

This rule of administrative finality was first enunciated (*Decatur* v. *Paulding*, 14 Pet. 497) and has perhaps been most consistently applied in mandamus actions, but logic has forced its extension to injunction actions the purpose of which is, as in mandamus, to compel administrative "action" or "nonaction." See, e. g., *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Smith* v. *Hitchcock*, 226 U. S. 53; *Adams* v. *Nagle*, 303 U. S. 532. As was said in *Gaines* v. *Thompson*, 7 Wall. 347, 352:

> The doctrine * * * is as applicable to the writ of injunction as it is to the writ of mandamus.

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[23] *Decatur* v. *Paulding*, 14 Pet. 497; *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683; *Hall* v. *Payne*, 254 U. S. 343; *Smith* v. *Hitchcock*, 226 U. S. 53; *Miguel* v. *McCarl*, 291 U. S. 442; *Adams* v. *Nagle*, 303 U. S. 532; *Brunswick* v. *Elliott*, 103 F. (2d) (App. D. C.).

Nor has the court distinguished (if a distinction can really be made) between mandatory injunctions to compel the taking of action which the official declines to take (e. g., *Bates & Guild Co.* v. *Payne,* 194 U. S. 106; *Houston* v. *St. Louis Ind. Packing Co.,* 249 U. S. 479; *Smith* v. *Hitchcock,* 226 U. S. 53) and ordinary injunctions to restrain an officer from taking action said to be contrary to law (e. g., *Gaines* v. *Thompson,* 7 Wall. 347; *Public Clearing House* v. *Coyne,* 194 U. S. 497; *Adams* v. *Nagle,* 303 U. S. 532).

All these classes of cases have deserved and have been given identical treatment.[24] In the absence of the sanction of a statutory method of review, the courts have sought only to keep the actions of the administrative official within the bounds both of reason and of his jurisdiction. The aim of this "common-law" procedure of control by mandamus or injunction is not the correction of reasonable errors, but solely the curbing of arbitrariness.

Of course, in many instances, Congress has treated administrative agencies somewhat as lower courts and has provided statutory methods for reviewing their action. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* No. 265, this Term. In such cases, questions of law are

[24] See Note, *Mandatory Injunctions as Substitutes for Writ of Mandamus in the Federal District Courts; A Study in Procedural Manipulation* (1938) 38 Col. L. Rev. 903, for other indications of the identical treatment of mandamus and injunctions.

meant to be left to the courts, and only findings of fact, if supported by substantial evidence, are intended to be conclusive.[25] Likewise, if the administrative agency has no jurisdiction to act under the circumstances, the court will not, of course, accept its views as binding. *Sante Fe Pac. R. R. Co.* v. *Payne*, 259 U. S. 197; *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639; *Waite* v. *Macy*, 246 U. S. 606. And if the court, in a distinct proceeding, not involving judicial review of or control over administrative action, is called upon itself to construe a statute, a determination of the administrative tribunal as to the statute's meaning in other and unrelated proceedings is not binding. *Chicago, Mil. & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97.

In a number of cases (on some of which respondents have relied) the error of law was held to be so plain as to be beyond the protection of this facet of the rule of administrative finality. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Daniels* v. *Wagner*, 237 U. S. 547; *Payne* v. *Central Pac. R. Co.*, 255 U. S. 228,

[25] In this class fall the following cases relied upon by respondents below: *Ann Arbor R. R.* v. *United States*, 281 U. S. 658; *United States* v. *Idaho*, 298 U. S. 105. Also in this class are tax and customs suits against collectors or in the Court of Claims to recover taxes or duties unlawfully collected. *Iselin* v. *United States*, 270 U. S. 245; *Merritt* v. *Welsh*, 104 U. S. 694; *Morrill* v. *Jones*, 106 U. S. 466. This is one statutory method for reviewing the collection of revenue.

234, 238; *Work* v. *Louisiana*, 269 U. S. 250; *Waite* v. *Macy*, 246 U. S. 606. But such, quite evidently, is not the case here.

B. THE IRON AND STEEL WAGE DETERMINATION IS A PROPER APPLICATION OF THE ACT

The respondents in their complaint alleged (R. 27–31) and in the court below argued that the wage determination of the Acting Secretary, even if his definition of "locality" be accepted, was arbitrary and capricious. Their brief in opposition in this Court makes no such argument, although the statement of facts evidences (pp. 10–18) considerable dissatisfaction with the determination. We think it plain that the Public Contracts Act, if it be construed as we have urged, was properly applied in this case.

1. The determination is a legislative rather than a judicial function and, therefore, is not subject to review as to the sufficiency of the evidence

We shall, in the next subsection, indicate that the wage determination is in entire accord with the Act and is fully supported by the evidence. At the outset, however, it should be pointed out that the determination, if reviewable at all, is not subject to a reexamination so precise as contemplated by the respondents below. This is because the determination is a legislative rather than a "quasi-judicial" function.

The Public Contracts Act makes no provision for a hearing prior to a determination of prevailing

minimum wages. In contrast to the violation proceedings contemplated by Section 5,[26] the wage determination to be made by the Secretary under Section 1 (b) is an essentially legislative act dealing with the internal conduct of the business affairs of the Government, in its relation to an entire industry, and is in no sense an order in the nature of a judgment directed against particular individuals. Under these circumstances it was unnecessary to provide notice and hearing. See Fuchs, *Procedure in Administrative Rule Making,* 52 Harv. Law Rev. 259. Certainly no such requirement was imposed.[27]

In fact, the Public Contracts Board has uniformly held hearings before making its recommendations to the Secretary and has uniformly given notice to members of the industry involved.[28] Such

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[26] As we have already shown (*supra*, pp. 51–60), Section 5 deals with proceedings to enforce the Act. These are of a quasi-judicial character and result in orders in the nature of judgments, imposing liability upon particular persons for breach of the contract stipulations required by the Act. These are the "decisions," contemplated by Section 5, which must be "based upon findings of fact [required to be made after notice and hearing], as are deemed to be necessary to enforce the provisions of this Act."

[27] That the Act does not require a hearing in the determination of minimum wages was recognized by the House Committee on the Judiciary in its report on a bill, which failed of passage, to amend the Public Contracts Act. Speaking of the amendment to the prevailing wage section, the committee said: "* * * it embodies the requirement of notice and hearing, a practice which has consistently been followed in the administration of the Act although there

a procedure is plainly a convenient means by which to accumulate data in respect of the prevailing minimum wages. But this, however desirable, practice cannot, of course, serve to convert an essentially legislative investigation into a quasi-judicial proceeding. Nor can it invalidate a determination which would have been valid without hearing or evidence, simply because the evidence which was received is alleged to be inadequate to support the determination. The hearings before the Public Contracts Board are analogous to those before a committee of the Congress; they are helpful to the Secretary, and perhaps indispensable to a wise administration of the Act, but they do not transform an industry-wide investigation into a regulatory proceeding directed against particular individuals.

There is no requirement of the Constitution that hearings be held and the determination supported by evidence adduced therein. The Secretary exercises a delegated legislative authority to ascertain the facts in particular industries; he does not prescribe penalties or regulations for particular persons. Accordingly, neither the Constitution nor "the rudimentary requirements of fair play" (*Morgan* v. *United States*, 304 U. S. 1, 15) fix the

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was no legal requirement to do so * * *." H. Rep. No. 2608, 75th Cong., 3d Sess. (H. R. 6449), p. 5. The same statement was made by the Senate Committee on Education and Labor, reporting on S. 2165, which was similar to H. R. 6449. See Sen. Rep. No. 1810, 75th Cong., 3d Sess., p. 5.

[28] See Report of Attorney General's Committee on Administrative Procedure, the Walsh-Healey Act, pp. 51, 61–63.

character of the investigation the Secretary may undertake; by the same token, there can be no judicial review of the determination nor any requirement that the determination be supported by the evidence introduced at any hearing which might be held. *Norwegian Nitrogen Co.* v, *United States,* 288 U. S. 294, 304–305; *Buttfield* v. *Stranahan,* 192 U. S. 470, 497; *Pacific States Co.* v. *White,* 296 U. S. 176, 185–186; *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15; *Monongahela Bridge* v. *United States,* 216 U. S. 177, 195; see *The Philadelphia & Trenton R. R. Co.* v. *Stimpson,* 14 Pet. 448, 458; *Martin* v. *Mott,* 12 Wheat. 19, 30. These decisions apply *a fortiori* here. For the wage determination is not a regulatory order but relates simply to the terms upon which the Government will enter into contracts for the purchase of goods from those who choose to bid.

It follows that the allegations of the complaint as to the arbitrary nature of the determination add nothing to respondents' case.[29] Thus, even if this were not legislation governing purely internal governmental affairs, but were regulatory legislation, the validity of the administrative application of the legislative power would not be determinable by ref-

[29] The allegation in the complaint to the effect that the determination is arbitrary and capricious is a mere conclusion of law not admitted by the motion to dismiss. *Silberschein* v. *United States,* 266 U. S. 221, 225; *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 447; *Public Service Commission of Montana* v. *Great Northern Utilities Co.,* 289 U. S. 130, 137.

erence to the evidence adduced at a discretionary hearing but would be valid if any state of facts reasonably could be conceived that would sustain it. *Pacific States Co.* v. *White, supra,* 185. Cf. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 154. *A fortiori,* the administrative exercise of a non-regulatory power of the character here involved is not to be held invalid even should the determination not be supported by the evidence. In a case such as this the test of arbitrariness is simply whether the administrative officer has acted fraudulently, dishonestly, and in bad faith.[30] As stated in *Adams* v. *Nagle,* 303 U. S. 532, pp. 542, 543:

> * * * if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion.
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> * * * The epithet "arbitrary" used in this connection can mean no more than do the other averments that the Comptroller,

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[30] *Adams* v. *Nagle,* 303 U. S. 532, 542, 543; *United States ex rel. Ness* v. *Fisher,* 223 U. S. 683, 691–693; *United States ex rel. Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324; *McBride* v. *Schurz,* 102 U. S. 378; *Litchfield* v. *Register and Receiver,* 9 Wall. 575; *Gaines* v. *Thompson,* 7 Wall. 347; *United States ex rel. Tucker* v. *Seaman,* 17 How. 224, 230; *Decatur* v. *Paulding,* 14 Pet. 497, 515; *Gillioz* v. *Webb,* 99 F. (2d) 585 (C. C. A. 5th); *Procter & Gamble Co.* v. *Coe,* 96 F. (2d) 518 (App. D. C.); *B. F. Cummins Co.* v. *Burleson,* 40 App. D. C. 500.

> in reaching his conclusion, "committed grave error of law" in failing to regard the contract of February 17 as effective. It would be arbitrary, in the proper sense of the term, for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action, but where he essays to exercise the jurisdiction conferred upon him, though his errors may be subject to subsequent correction, they cannot be enjoined as an arbitrary exercise of his authority. To hold otherwise would render orderly administrative procedure impossible.

Respondents have made no suggestion that the determination was not made in good faith. It follows that there can be no judicial reexamination of the accuracy of the Acting Secretary's determination or of the sufficiency of the evidence to support it.

2. The determination is fully supported by the evidence

The respondents' complaint, however, must be dismissed even if the minimum wage determination were fully subject to judicial review. Respondents admit that the report and findings of the Board accurately show the minimum wages paid by the various steel plants, and concede that the objections before the Acting Secretary turned solely upon the construction of Section 1 (b) of the Act (R. 241; Br. in Opp., pp. 10-11). There is, therefore, no question other than the proper demarca-

tion of the localities in which, in advance of the bidding, it may be said that steel products "are to be manufactured" under government steel contracts. Respondents' allegation (R. 30–31) that the record contains no evidence to support the demarcation can mean only that they protest the criteria adopted by the Acting Secretary.

The Public Contracts Board made an elaborate analysis of the comprehensive data which had been submitted to it (R. 48–207). The data showed that well over half of the employees (both total employees and common laborers) were employed in plants where the minimum wage rate was 62.5 cents per hour, and that the minimum rates ranged about this median point from a low of 30 cents to a high of 70 cents (R. 123). To these data, the principles of classification found relevant to this industry were applied. The most significant of these, in the view of both the Board and the Acting Secretary, were the existence of well-defined competitive zones in the industry (R. 180–190), the existence of geographic groupings of plants (R. 156–180), and the existence of distinct minimum wage patterns (R. 164–180). The Board found the market area to be substantially national in extent and concluded that the only significant geographic differences in prevailing minimum wages were to be found between the Northern and the Southern states. Accordingly, the majority recommended a determination of 45 cents for the Southern states and 62.5 cents for

the others (R. 206). While adopting the same criteria (R. 244, 246, 247–251), the Acting Secretary determined that the factor of geographic groupings of plants had received too little emphasis by the Board (R. 247) and divided the Northern states into five groups, which may roughly be described as the Pacific, the Mountain, the trans-Mississippi, the Central, and the Eastern states. The minimum wage determination was 60 cents for the first two localities, 62.5 cents for the last two, and 58.5 cents for the trans-Mississippi states (R. 253–254).

It seems clear that respondents could not successfully attack the determination as arbitrary if the factor of the zone of competition as well as the geographic groupings of plants was legitimately considered by the Acting Secretary. But we have shown that the intention of Congress and the plain purposes of the Act would be frustrated if the area of market competition must be ignored. Indeed, its relevance is graphically shown by the testimony of respondents or their officers. The South Chester Tube Company said (R. 181):

> The products manufactured by the Company are in demand largely in the oil and gas fields of this and foreign countries. The major portion of the Company's output is sold in Texas, California, Oklahoma, Louisiana, Kansas, New Mexico, and West Virginia. The Company is in constant competition at all points with Pittsburgh mills manufacturing similar products.

An officer of the Harrisburg Steel Corporation testified (R. 182):

> that his company did not compete with the Central Iron and Steel Company also in Harrisburg, nor with the Bethlehem plant at Steelton in the neighborhood, but that his company competed with Bethlehem on products manufactured by Bethlehem at other locations.

It seems unlikely that respondents will dispute the large area of competition found in government steel contracts.[31] But it may be well affirmatively to indicate its extent. The report of the Board summarizes and gives illustrative examples of government steel contracts which demonstrate "that the Government requirements for iron and steel are served by plants located in all parts of the country" (R. 184, 185–188). An analysis of 72 steel contracts, totalling $5,015,711.32, awarded by the Navy Department, the War Department, the Panama Canal Zone, and the Bureau of Reclamation of the Department of the Interior during the six months' period immediately preceding the date of this determination[31a] shows conclusively that the locality

[31] See "Report of the Federal Trade Commission to the President in response to Executive Order of May 30, 1934, with Respect to the Basing-Point System in the Iron and Steel Industry," U. S. Government Printing Office, November 1934, pp. 14–18 and *passim*.

[31a] The data is taken from the files of the Public Contracts Division and the Departments involved; a typewritten summary has been filed with the Clerk and submitted to counsel.

in which respondents' plants are located is the smallest possible area within which, in advance of the award of a contract, it can be determined that any contract will be performed.

Thus, on 31 of these contracts, totalling $2,642,595.69, the bidders on each contract were distributed in varying degrees throughout the entire country. The nature of the competition on these contracts indicates that it is not even probable that contracts will be performed in any particular locality smaller than that which embraces all of the plants of the industry. On the remaining 41 of the contracts, totalling $2,373,115.63, all of the bidders on each contract were located either in the locality here challenged (hereinafter referred to as the "northeastern locality") or in the locality immediately to the west (hereinafter referred to as the "midwestern locality"), in which the prevailing minimum wage is also 62.5 cents per hour.

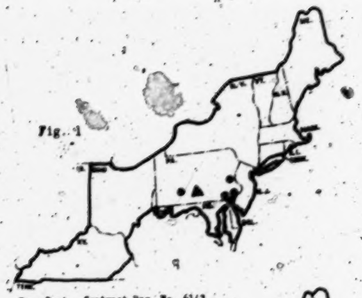
On 16 of the last-mentioned group of contracts, totalling $335,534.29, all of the bidders on each contract were located within the northeastern locality. As is shown on the map FIRST FACING ~~on the preceding~~ page, the competition among bidders located throughout this locality is general. The phenomenon of "alternative bidding" indicated on several of the contracts depicted brings home the fact that no area less extensive than this smallest discernible area of bidders would be appropriate to the accomplishment of the purposes of the Act. In Figures 2, 3, 4, 5, 6, 7, 8, 12, and 15, on this map, the connection of

two or more points by a line indicates that a particular bidder stated in his bid that, if awarded the contract, steel would be supplied from any or all of the connected plants. Thus, even after the award of the contract, the place of performance might be determinable at the option of the lowest bidder. In the case of the contract depicted in Fig. 8, for example, had the Bethlehem Steel Company, of Bethlehem, Pennsylvania, been awarded the contract, the materials would have been manufactured either in Johnstown or Lebanon, Pennsylvania, or both; had another bidder, the Enterprise Galvanizing Company, of Philadelphia, Pennsylvania, been awarded the contract, the materials would have been manufactured either in Philadelphia or Pittsburgh, Pennsylvania or both; had the Ross Galvanizing Works, Inc., of Brooklyn, New York, been awarded the contract, the materials would have been manufactured either in Brooklyn, New York, or Pittsburgh, Pennsylvania, or both. Clearly, the Congressional objective of rewarding rather than penalizing the high wage manufacturer can only be accomplished by the determination of the uniform minimum wage prevailing throughout an area in which it is realistically possible to say that the "materials * * * are to be manufactured" and within which the payment of less than the uniform minimum standard may attract the place of actual performance away from the fair wage standard employer.

The map on the opposite page indicates the nature and scope of the competition on the 25 contracts on each of which the bidders were distributed throughout both the northeastern and the midwestern localities. Here, again, the prevalence of alternative bids strongly suggests the necessity of treating the entire area as a "locality" within which, in advance of the bidding, it is possible to say that a given contract will be performed.

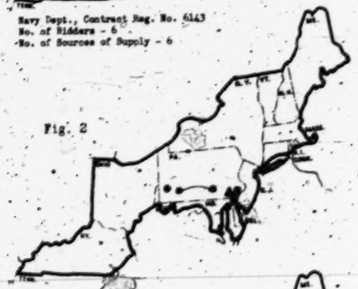
We have, then, a situation in which the iron and steel industry on many occasions competes for government contracts throughout the national area and, on numerous other occasions, competes for government contracts throughout more restricted areas. The problem faced by the Acting Secretary and by the Board in making its recommendation was the delineation, under Section 1 (b), of "the locality in which the materials * * * are to be manufactured or furnished." Under one view, the Acting Secretary would have been wholly justified in describing the entire country as the locality in which the materials are to be furnished. On the other hand, the evidence before the Board indicated that many government contracts for iron and steel were filled from more restricted regions (R. 187–188). The Acting Secretary resolved this problem by grouping the iron and steel plants into what he found to be fairly well defined geographical areas. This grouping was checked by examination of the wage patterns within the geographic areas. So arranged, he found a reasonable homo-

Fig. 1



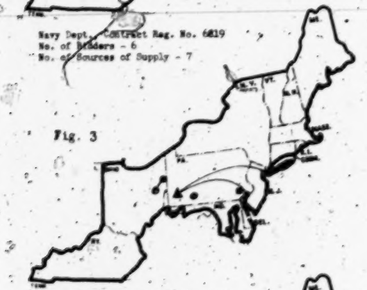
Navy Dept., Contract Reg. No. 6143
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 2



Navy Dept., Contract Reg. No. 6819
No. of Bidders - 6
No. of Sources of Supply - 7

Fig. 3



Navy Dept., Contract Reg. No. 6842
No. of Bidders - 10
No. of Sources of Supply - 13

Fig. 4

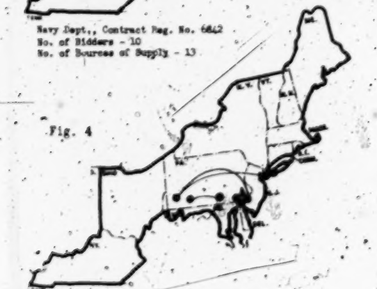
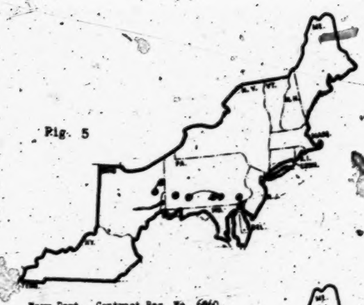
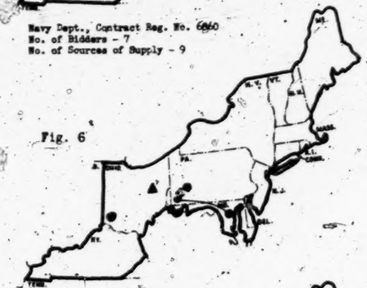


Fig. 5



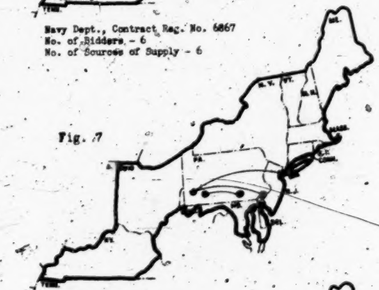
Navy Dept., Contract Reg. No. 6860
No. of Bidders - 7
No. of Sources of Supply - 9

Fig. 6



Navy Dept., Contract Reg. No. 6867
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 7



Navy Dept., Contract Reg. No. 6952
No. of Bidders - 8
No. of Sources of Supply - 10

Fig. 8

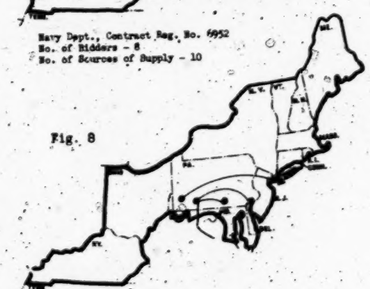
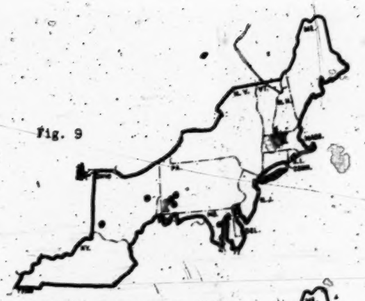
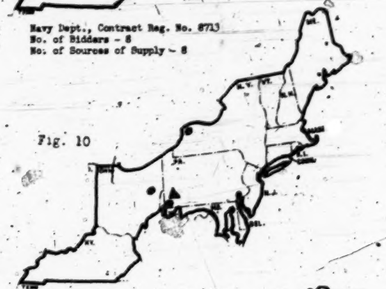


Fig. 9



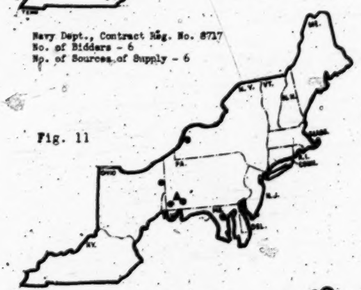
Navy Dept., Contract Reg. No. 8713
No. of Bidders - 8
No. of Sources of Supply - 8

Fig. 10



Navy Dept., Contract Reg. No. 8717
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 11



War Dept., Contract Reg. No. 7376
No. of Bidders - 9
No. of Sources of Supply - 9

Fig. 12

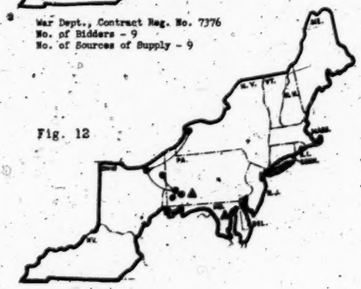
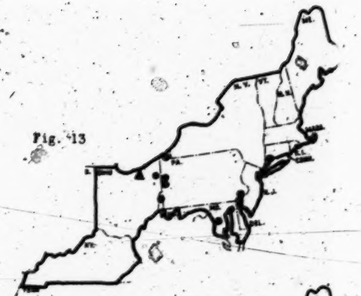
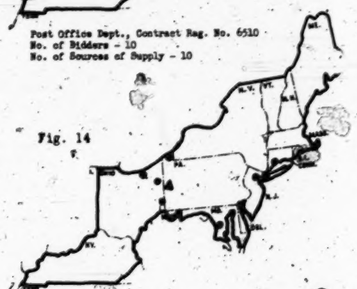


Fig. 13



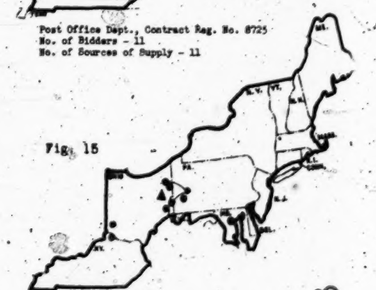
Post Office Dept., Contract Reg. No. 6510
No. of Bidders - 10
No. of Sources of Supply - 10

Fig. 14



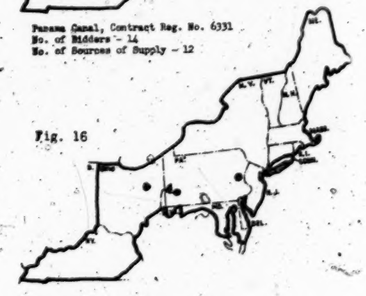
Post Office Dept., Contract Reg. No. 8725
No. of Bidders - 11
No. of Sources of Supply - 11

Fig. 15



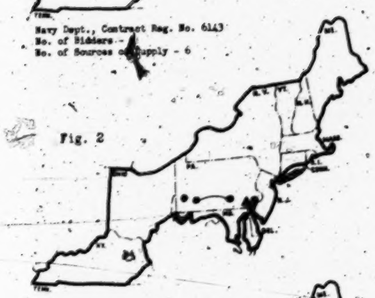
Panama Canal, Contract Reg. No. 6331
No. of Bidders - 14
No. of Sources of Supply - 12

Fig. 16



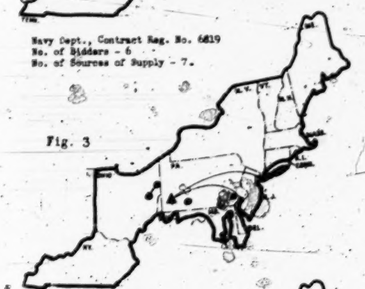
Navy Dept., Contract Reg. No. 6143
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 2



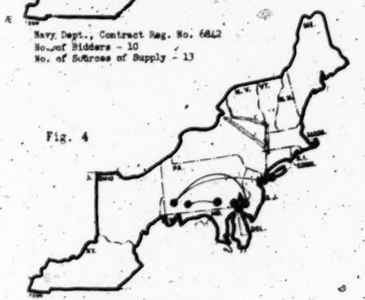
Navy Dept., Contract Reg. No. 6819
No. of Bidders - 6
No. of Sources of Supply - 7

Fig. 3



Navy Dept., Contract Reg. No. 6842
No. of Bidders - 10
No. of Sources of Supply - 13

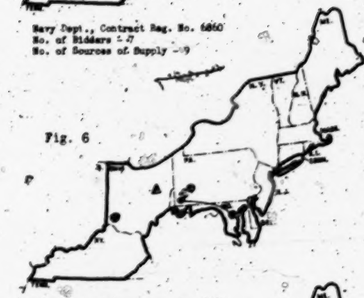
Fig. 4



Navy Dept., Contract Reg. No. 6858
No. of Bidders - 13
No. of Sources of Supply - 14

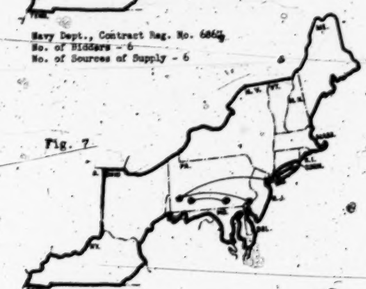
Navy Dept., Contract Reg. No. 6860
No. of Bidders - 7
No. of Sources of Supply - 9

Fig. 6



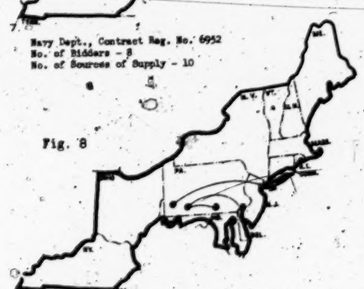
Navy Dept., Contract Reg. No. 6867
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 7



Navy Dept., Contract Reg. No. 6952
No. of Bidders - 8
No. of Sources of Supply - 10

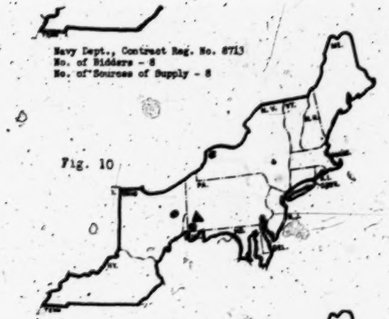
Fig. 8



Navy Dept., Contract Reg. No. 6953
No. of Bidders - 8
No. of Sources of Supply - 10

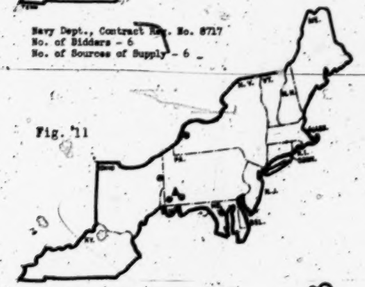
LEGEND

4-Sources of supply of successful bidders.
4-Sources of supply of other bidders
Interconnecting lines indicate alternative sources of supply.



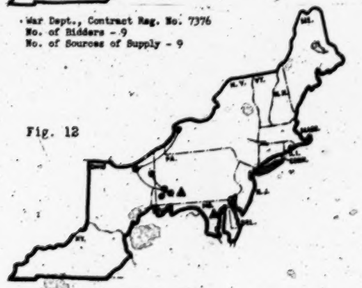
Navy Dept., Contract Reg. No. 8713
No. of Bidders - 8
No. of Sources of Supply - 8

Fig. 10



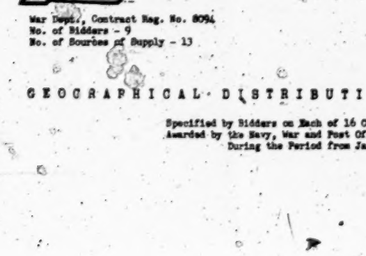
Navy Dept., Contract Reg. No. 8717
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 11

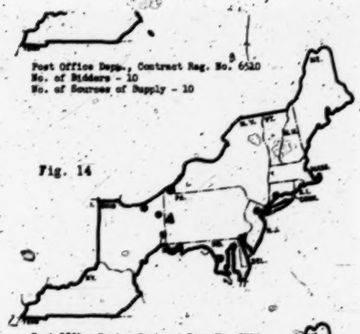


War Dept., Contract Reg. No. 7376
No. of Bidders - 9
No. of Sources of Supply - 9

Fig. 12

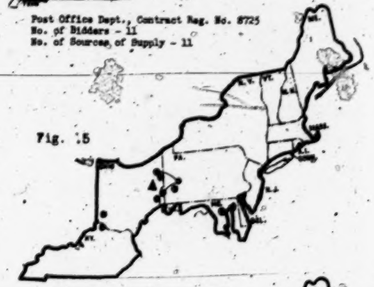


War Dept., Contract Reg. No. 8094
No. of Bidders - 9
No. of Sources of Supply - 13



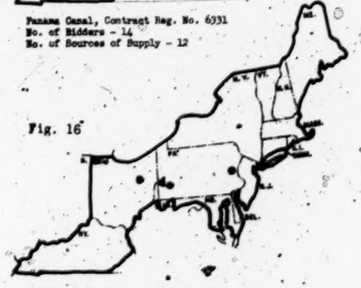
Post Office Dept., Contract Reg. No. 6520
No. of Bidders - 10
No. of Sources of Supply - 10

Fig. 14



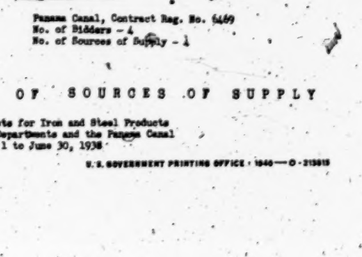
Post Office Dept., Contract Reg. No. 8725
No. of Bidders - 11
No. of Sources of Supply - 11

Fig. 15



Panama Canal, Contract Reg. No. 6331
No. of Bidders - 14
No. of Sources of Supply - 12

Fig. 16



Panama Canal, Contract Reg. No. 6469
No. of Bidders - 4
No. of Sources of Supply - 4

GEOGRAPHICAL DISTRIBUTION OF SOURCES OF SUPPLY

Specified by Bidders on Each of 16 Contracts for Iron and Steel Products
Awarded by the Navy, War and Post Office Departments and the Panama Canal
During the Period from January 1 to June 30, 1938

U. S. GOVERNMENT PRINTING OFFICE : 1940 — O - 215815

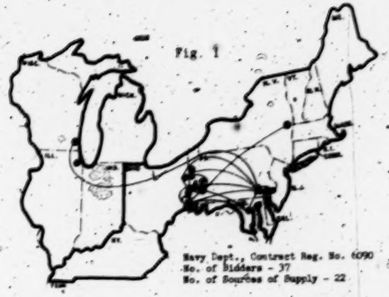


Fig. 1

Navy Dept., Contract Reg. No. 6090
No. of Bidders - 37
No. of Sources of Supply - 22

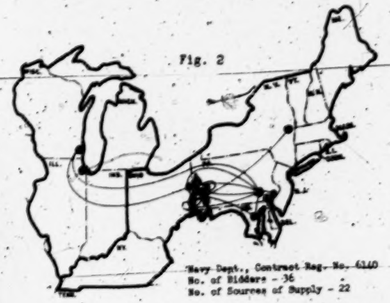


Fig. 2

Navy Dept., Contract Reg. No. 6140
No. of Bidders - 36
No. of Sources of Supply - 22

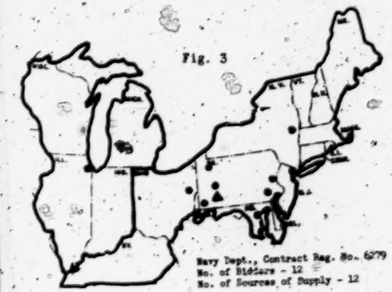


Fig. 3

Navy Dept., Contract Reg. No. 6279
No. of Bidders - 12
No. of Sources of Supply - 12

Fig. 4

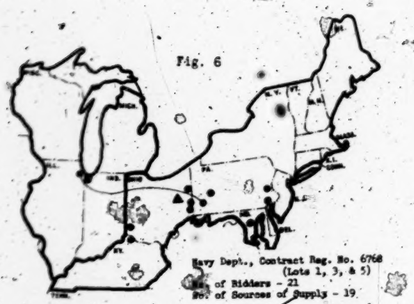


Fig. 6

Navy Dept., Contract Reg. No. 6768
(Lots 1, 3, & 5)
No. of Bidders - 21
No. of Sources of Supply - 19

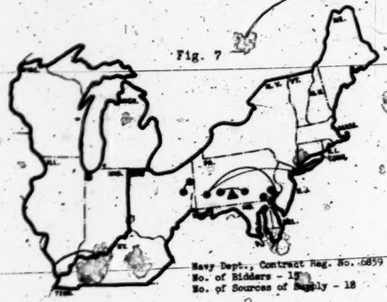


Fig. 7

Navy Dept., Contract Reg. No. 6859
No. of Bidders - 15
No. of Sources of Supply - 18

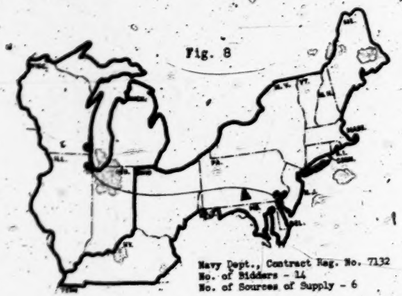


Fig. 8

Navy Dept., Contract Reg. No. 7132
No. of Bidders - 14
No. of Sources of Supply - 6

Fig. 9

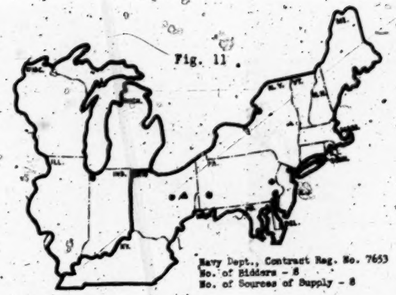


Fig. 11

Navy Dept., Contract Reg. No. 7653
No. of Bidders - 8
No. of Sources of Supply - 8

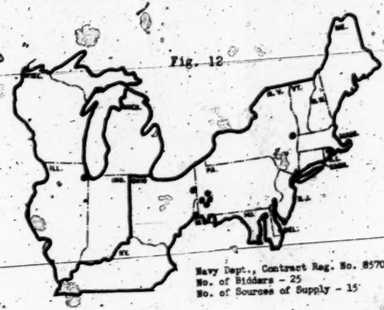


Fig. 12

Navy Dept., Contract Reg. No. 8570
No. of Bidders - 25
No. of Sources of Supply - 15

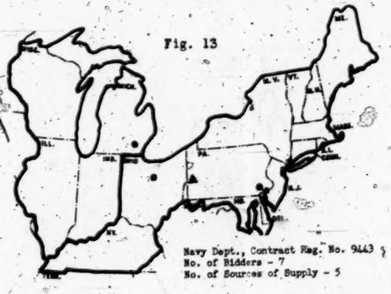


Fig. 13

Navy Dept., Contract Reg. No. 9443
No. of Bidders - 7
No. of Sources of Supply - 5

Fig. 14

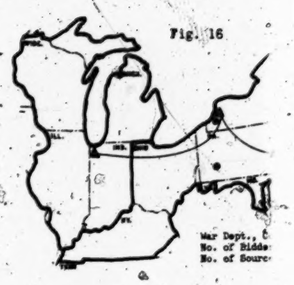


Fig. 16

War Dept., C
No. of Bidde
No. of Source

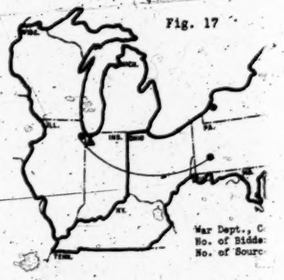


Fig. 17

War Dept., C
No. of Bidde
No. of Sourc

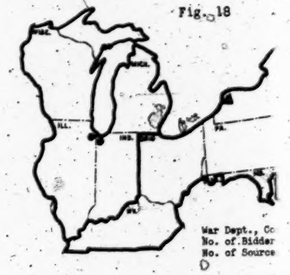


Fig. 18

War Dept., Co
No. of Bidder
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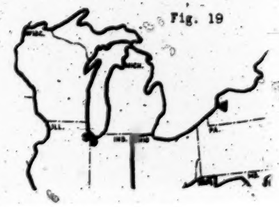
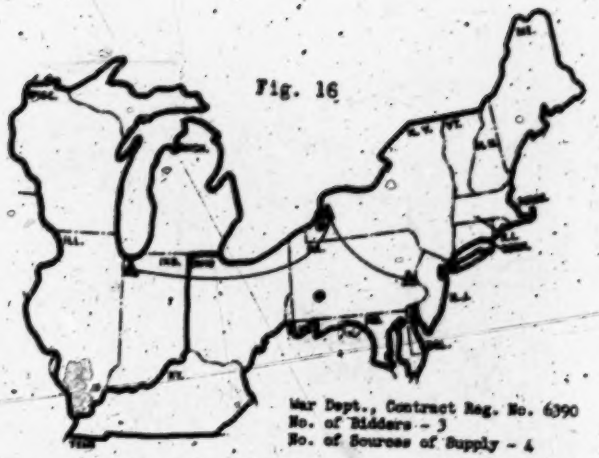


Fig. 19

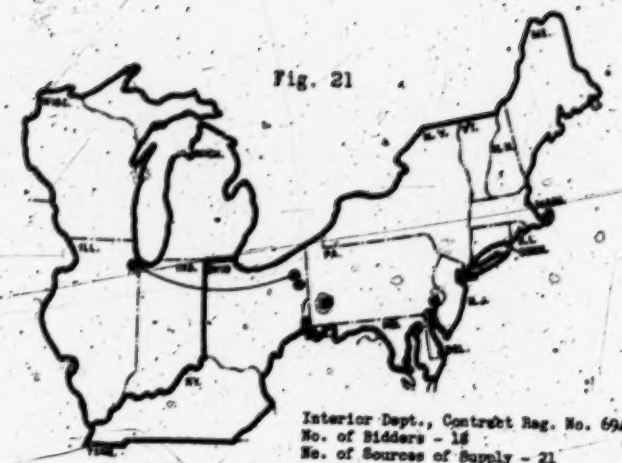
, Contract Reg. No. 7653
dders - 8
urces of Supply - 8

Fig. 16



War Dept., Contract Reg. No. 6390
No. of Bidders - 3
No. of Sources of Supply - 4

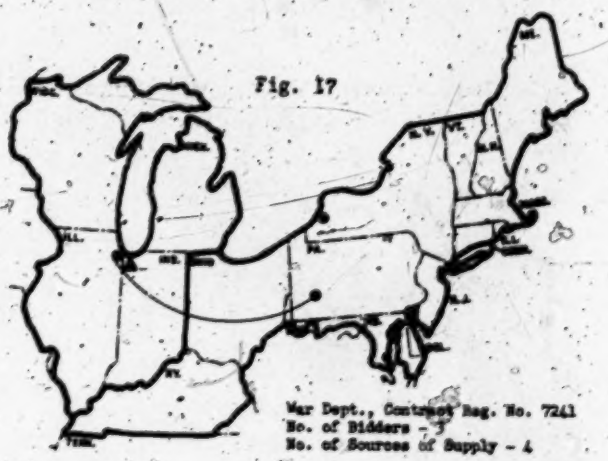
Fig. 21



Interior Dept., Contract Reg. No. 6941
No. of Bidders - 18
No. of Sources of Supply - 21

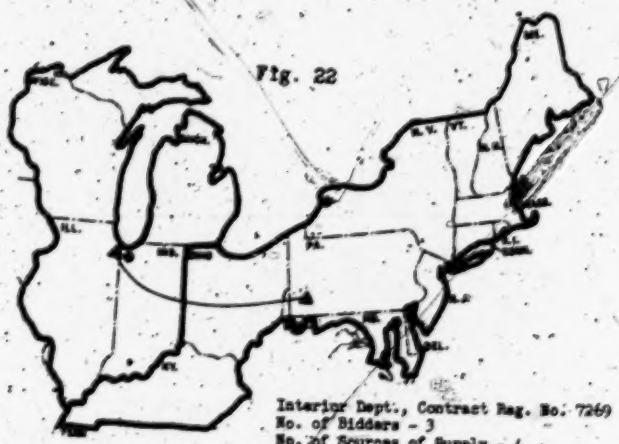
, Contract Reg. No. 8570
dders - 25
urces of Supply - 15

Fig. 17



War Dept., Contract Reg. No. 7241
No. of Bidders - 3
No. of Sources of Supply - 4

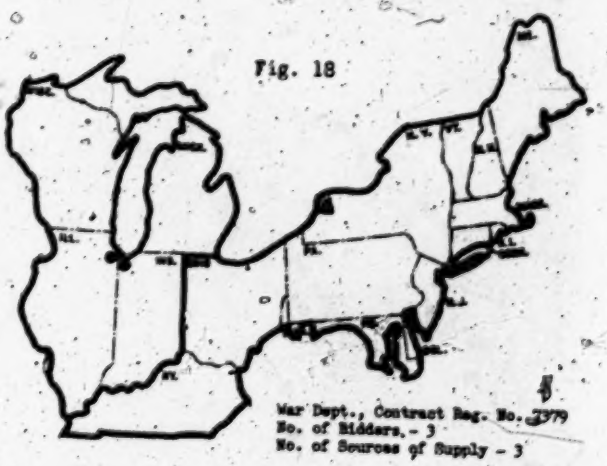
Fig. 22



Interior Dept., Contract Reg. No. 7269
No. of Bidders - 3
No. of Sources of Supply - 4

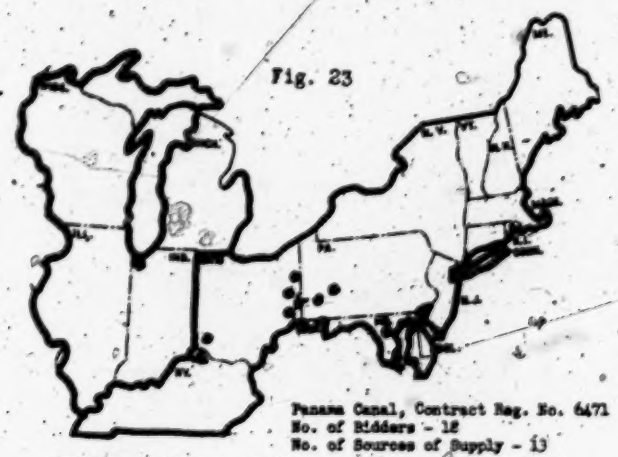
Contract Reg. No. 9443
ers - 7
ces of Supply - 5

Fig. 18



War Dept., Contract Reg. No. 7379
No. of Bidders - 3
No. of Sources of Supply - 3

Fig. 23



Panama Canal, Contract Reg. No. 6471
No. of Bidders - 12
No. of Sources of Supply - 13

Fig. 19

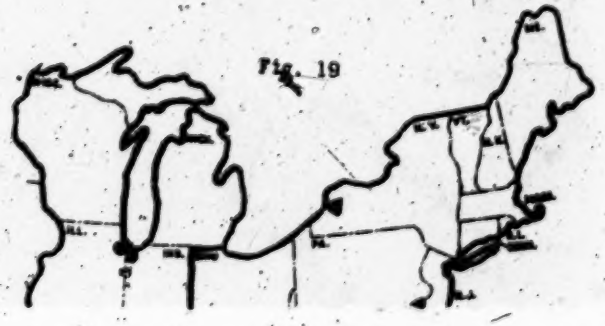


Fig. 24

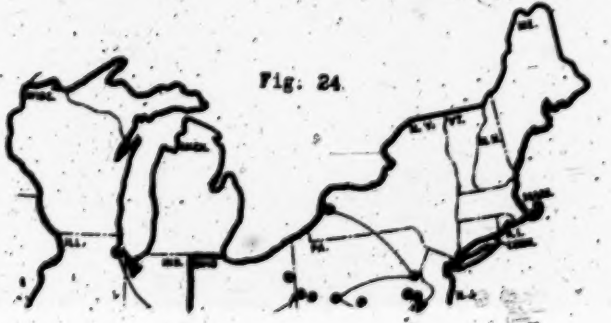
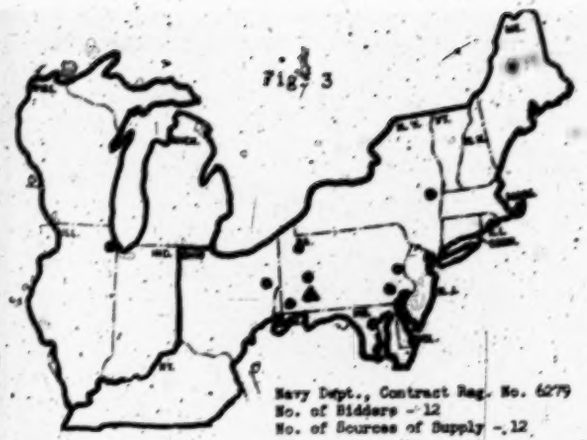
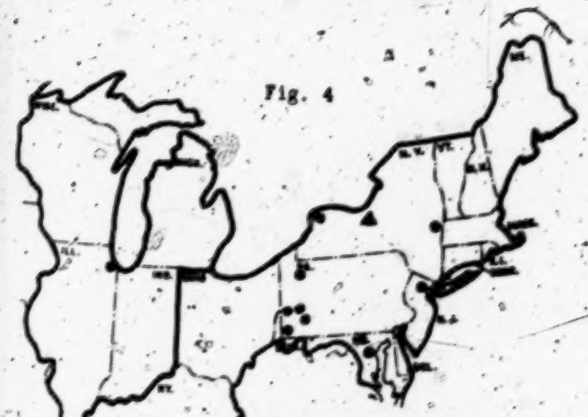


Fig. 3



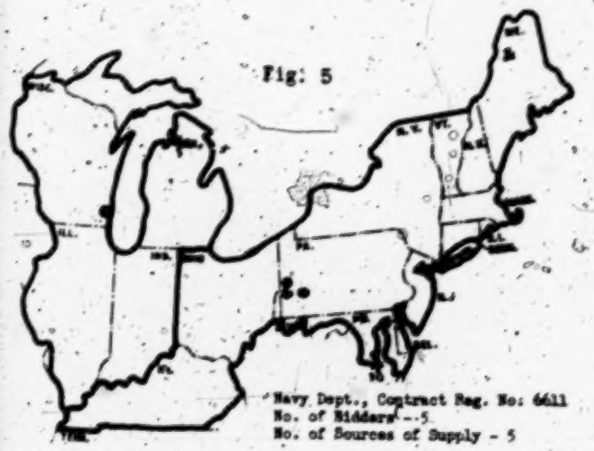
Navy Dept., Contract Reg. No. 6279
No. of Bidders - 12
No. of Sources of Supply - 12

Fig. 4



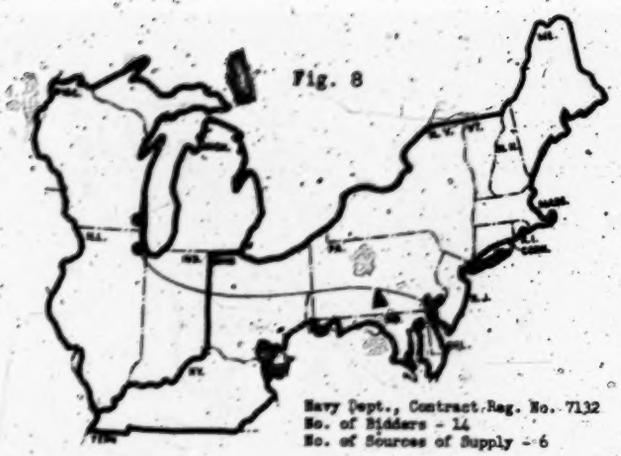
Navy Dept., Contract Reg. No. 6575
No. of Bidders - 12
No. of Sources of Supply - 12

Fig. 5



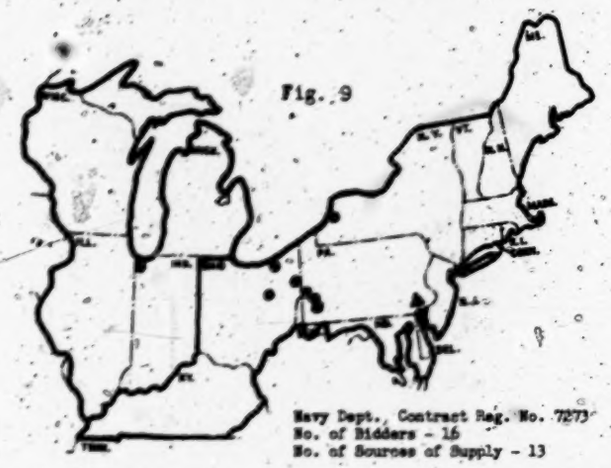
Navy Dept., Contract Reg. No. 6611
No. of Bidders - 5
No. of Sources of Supply - 5

Fig. 8



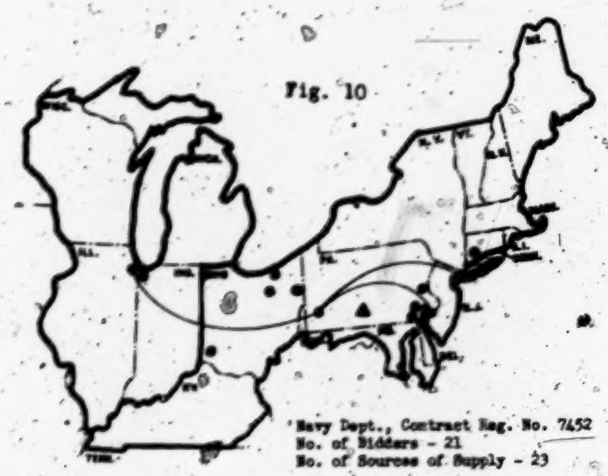
Navy Dept., Contract Reg. No. 7132
No. of Bidders - 14
No. of Sources of Supply - 6

Fig. 9



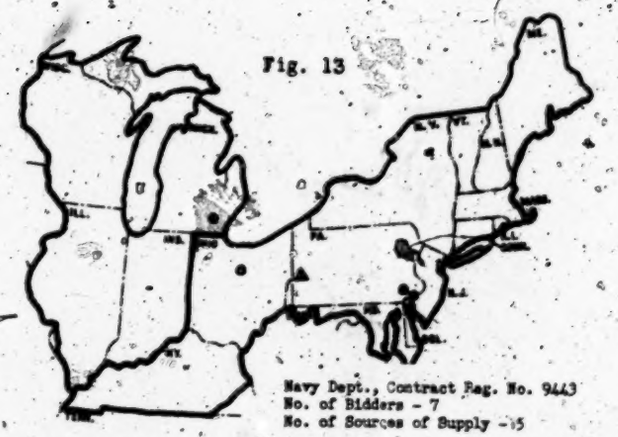
Navy Dept., Contract Reg. No. 7273
No. of Bidders - 16
No. of Sources of Supply - 13

Fig. 10



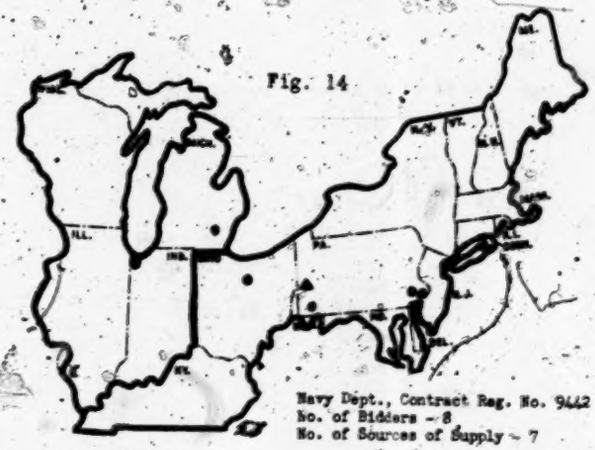
Navy Dept., Contract Reg. No. 7452
No. of Bidders - 21
No. of Sources of Supply - 23

Fig. 13



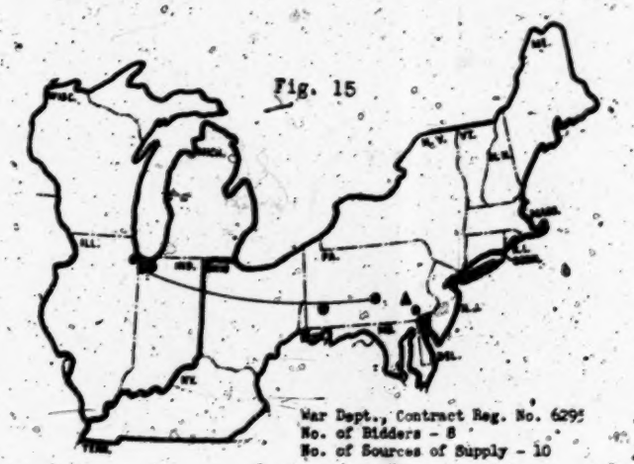
Navy Dept., Contract Reg. No. 9443
No. of Bidders - 7
No. of Sources of Supply - 5

Fig. 14



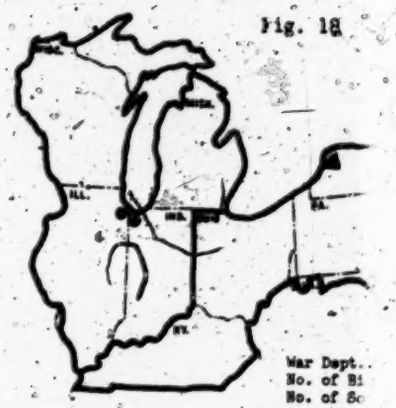
Navy Dept., Contract Reg. No. 9442
No. of Bidders - 8
No. of Sources of Supply - 7

Fig. 15



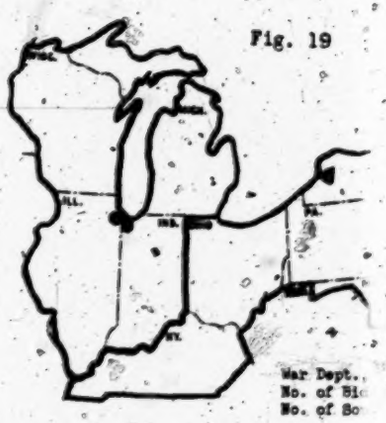
War Dept., Contract Reg. No. 6295
No. of Bidders - 8
No. of Sources of Supply - 10

Fig. 18



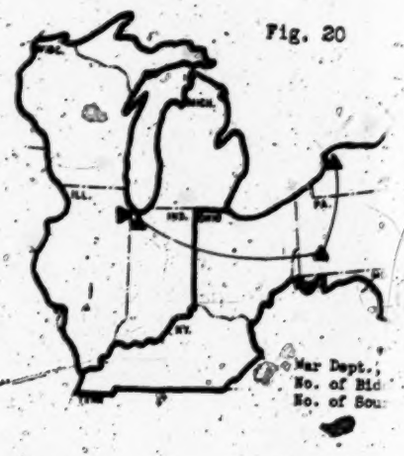
War Dept.,
No. of Bi
No. of So

Fig. 19



War Dept.,
No. of Bi
No. of So

Fig. 20



War Dept.,
No. of Bid
No. of Sou

GEOGRA

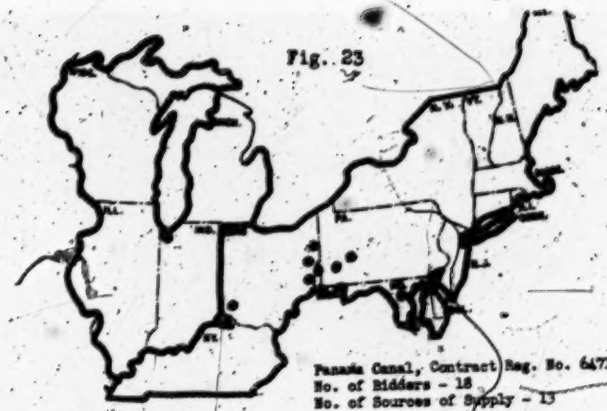
LEGEND
▲ - Sources of supply of successful bidders.
● - Sources of supply of other bidders.
Interconnecting lines indicate alternative sources of supply.

Contract Reg. No. 9443
...rs - 7
...es of Supply - 5

Fig. 18

War Dept., Contract Reg. No. 7379
No. of Bidders - 3
No. of Sources of Supply - 3

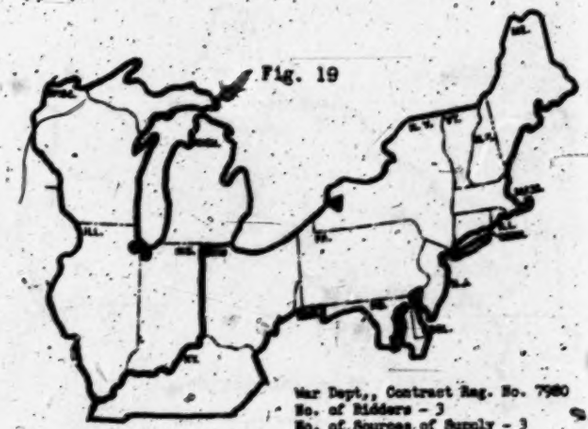
Fig. 23



Panama Canal, Contract Reg. No. 6471
No. of Bidders - 18
No. of Sources of Supply - 13

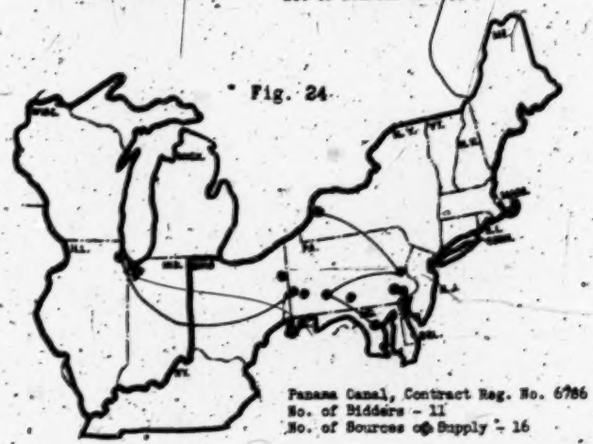
Contract Reg. No. 9442
...ders - 8
...es of Supply - 7

Fig. 19



War Dept., Contract Reg. No. 7980
No. of Bidders - 3
No. of Sources of Supply - 3

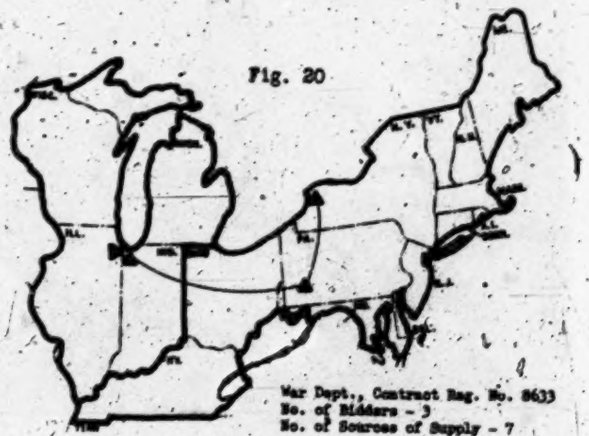
Fig. 24



Panama Canal, Contract Reg. No. 6786
No. of Bidders - 11
No. of Sources of Supply - 16

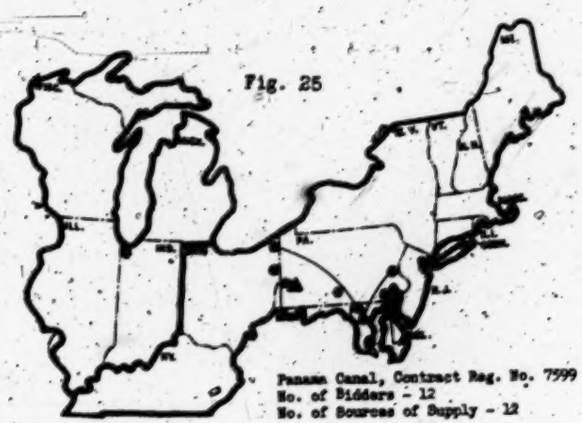
...ontract Reg. No. 6295
...rs - 8
...es of Supply - 10

Fig. 20



War Dept., Contract Reg. No. 8633
No. of Bidders - 3
No. of Sources of Supply - 7

Fig. 25



Panama Canal, Contract Reg. No. 7599
No. of Bidders - 12
No. of Sources of Supply - 12

GEOGRAPHICAL DISTRIBUTION OF SOURCES OF SUPPLY

Specified by Bidders on Each of 25 Contracts for Iron and Steel Products
Awarded by the Navy, War and Interior Departments and the Panama Canal
During the Period from January 1 to June 30, 1938

U.S. GOVERNMENT PRINTING OFFICE : 1940 — O - 213815

geneity of prevailing minimum wage rates within each of the six geographic areas (R. 239–254).

The respondents, quite obviously, do not object that the Acting Secretary broke the national market area into segments in response to the frequent localization of bids, and in response to geographical groupings corroborated by prevailing wage patterns. They object, rather, that the process of fractionalization was not carried further. But it seems perfectly evident that the determination of localities made by the Acting Secretary cannot be said to be unreasonably large once our construction of "locality" be accepted.

As we have shown by the analysis of the actual bidding on 72 contracts for steel products awarded during the six months prior to this determination, on only a few of those contracts did the actual bidding show that contracts would be performed in a locality or area substantially smaller than the Northeastern locality here challenged. On none of the contracts, as shown by the maps, was the bidding restricted to an area as small as that urged by respondents. To adopt the respondents' position would require that this apparently unvarying coalescence of the market area of the Northeastern locality be disregarded and the area split into small fractions in which different minimum wages would be paid according to the irrelevant consideration of the particular community in which the plant happened to be situated. We have shown that the Act, sensibly construed, cannot lead to such a result. By

the same token, the Acting Secretary cannot be said to have acted in disregard of the evidence because he declined to push the fragmentation argument urged by respondents to such an extreme as to frustrate the purposes of the Act and convert the determination into a useless affirmation of the *status quo*.

We do not urge that the considerations, weighed by the Acting Secretary—the market area, the geographical groupings of plants, and the prevailing wage patterns—can be applied with mathematical precision. It is his duty to reach a reasonable judgment based upon these considerations, and such others as he might have found to be relevant; to the extent that they point in different directions, he must of necessity strike a balance. This is the essence of the administrative function. Almost by definition, an honest judgment as to the best solution of such a problem cannot be said to be arbitrary. Certainly the painstaking report of the Public Contracts Board and the careful reexamination of the Acting Secretary compel the conclusion that, if their criteria be accepted, they have not arbitrarily been applied.

3. The respondents were accorded a fair hearing

We have shown there is neither statutory nor constitutional requirement that a wage determination be made only after a hearing. But even if we were so to assume, there can be no question but that the most exacting requirements have been met.

Hearings were held before the issuance of the steel wage determination, of which respondents had notice (R. 15, 45–46), and at which they were represented and submitted evidence (R. 16). The report and recommendations of the Public Contracts Board were sent to the respondents (R. 17, 47) with notice that they might take exceptions thereto (R. 17, 47). Respondents did file exceptions and a petition for the reopening of the hearings (R. 20–22, 218 et seq., 230 et seq.) and were afforded an opportunity to and did appear before the Acting Secretary for oral argument upon the exceptions (R. 22, 241). They were also afforded an opportunity to and did file a written brief in support of their exceptions (R. 22), which the Determination discloses were considered by the Acting Secretary (R. 241–247, 250–251).

Despite this punctilious observance of every requirement of statutory procedure, administrative fairness, and due process of law, the respondents in their bill of complaint (R. 31–32) aver that they were not accorded a fair hearing. We think none of the charges are such as to require answer; in any event, respondents as yet have not urged them in this Court.

V

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR A DECLARATORY JUDGMENT

If the respondents have no standing to sue, or if this action is one against the United States, or if the Secretary's Determination is not reviewable,

it follows, of course, that a declaratory judgment must be denied. The only issue, therefore, is whether declaratory relief may be granted even if injunctive relief is not allowed, or in addition to injunctive relief.

There are intimations, upon which the respondents and the court below rely, that a showing of irreparable injury need not be made in order to secure a declaratory judgment of rights. See *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 264; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241. Whatever may be the rule in ordinary private actions,[32] it seems plain that in the circumstances of this case declaratory relief should not be afforded if an injunction would not issue. One reason is simply that, since it will not be supposed that Government officials (perhaps unlike private persons) will disregard a declaration unaccompanied by coercive relief,[33] to grant a declaratory judgment is equivalent in every way to granting an injunction. An adjudication that the wage determination in question is invalid will prevent the inclusion of wage stipulations in Government steel contracts just as surely as an injunctive command. On the hypothesis that no injunction should issue, any such command to the

[32] There are those who consider the statements of this Court equivocal and the point unsettled. Note (1938) 51 Harvard L. Rev. 1267, 1270, n. 24.

[33] See Borchard, *Declaratory Judgments*, pp. 342–343; Ellingwood, *Declaratory Judgments in Public Law* (1934), 29 Ill. L. Rev. 1, 2.

Government officers is necessarily undesirable in the circumstances here presented.

The second reason why the declaratory judgment should not issue is that a proper regard for the public interest in this controversy requires the conclusion that the contracting and purchasing functions of the Government be not subjected to interference at the suit of prospective bidders. Whether or not all of the limitations upon equitable jurisdiction are applicable to a suit for declaratory judgment,[25] it hardly would be argued that a court should issue a declaratory judgment in disregard of the considerations of public interest which would stay the hand of an equity court asked to issue an injunction. Certainly, the grant of the declaratory judgment is a matter of discretion with the Court. *Aetna Casualty & Surety Co.* v. *Quarles,* 92 F. (2d) 321 (C. C. A. 4th); *United States Fidelity & Guaranty Co.* v. *Koch,* 102 F. (2d) 289 (C. C. A. 3d); *American Automobile Ins. Co.* v. *Freundt,* 103 F. (2d) 613, 617 (C. C. A. 7th). Just as a court of equity will refuse to enjoin the collection of taxes (*Dows* v. *City of Chicago,* 11 Wall. 108, 109–10; *State Railroad Tax Cases,* 92 U. S. 575, 613 et seq.) and will refuse a decree contradictory of a

[25] *United States Fidelity & Guaranty Co.* v. *Koch,* 102 F. (2d) 288, 290 (C. C. A. 3d); *cf. Lumbermen's Mut. Casualty Co.* v. *McIver,* 27 F. Supp. 702, 706 (S. D. Calif); *Ohio Casualty Ins. Co.* v. *Plummer,* 13 F. Supp. 169, 173 (S. D. Tex.); *Town of Manchester* v. *Town of Townshend,* 109 Vt. 65, 69, 192 Atl. 22, 23 (1937).

statutory policy (*United States* v. *Morgan*, 307 U. S. 183), so a court should refuse a declaratory judgment which with equal clarity contravenes an important public policy. Note (1938) 51 Harvard L. Rev. 1267, 1274; Simpson, *Fifty Years of American Equity* (1936) 50 Harvard L. Rev. 171, 241. We have shown (*supra*, pp. 61–70) that to grant respondents relief against the petitioners constitutes a serious invasion of the hitherto unquestioned freedom of the contracting and purchasing functions of the Government from interference at the suit of prospective vendors. The same considerations which indicate that the respondents should not be granted standing to maintain this suit, (*supra*, pp. 18–70), or to ask for equitable relief (*supra*, pp. 87–89), point to a like conclusion under the power of the courts to issue declaratory judgments.

If the Court should grant relief by injunction, there would seem to be no occasion to add a declaratory judgment. This, however, is a matter of no importance to the petitioners.

CONCLUSION

The decision below should be reversed. First, because the respondents have no standing to maintain this suit. Second, because the action is brought against the United States. Third, because respondents have suffered no irreparable damage. Fourth, because the determination of the Acting Secretary was correct, both as a matter of

law and, if this be subject to review, in its application to the facts of this industry. Finally, respondents are not entitled to a declaratory judgment.

Respectfully submitted.

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MARCH 1940.

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